The LGBT Bar Association of New York (LeGaL) and the Davis Polk LGBT Affinity Group present

LGBTQ LAW 2018 YEAR IN REVIEW CLE

Thursday, January 17, 2019 | 6:30-8:30 p.m.
Davis Polk & Wardwell LLP

CLE CREDITS:

1.0 Areas of Professional Practice | *For Newly Admitted and Experienced Attorneys*

1.0 Diversity, Inclusion, and Elimination of Bias | *For Experienced Attorneys Only*

PANELISTS:

Chinyere Ezie, *Staff Attorney*, Center for Constitutional Rights

Omar Gonzalez-Pagan, *Senior Attorney and Health Care Strategist*, Lambda Legal

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

Brett Figlewski (Moderator), *Legal Director*, LGBT Bar Association of New York

Davis Polk

LGBT BAR NY

LGBTQ Law 2018 Year In Review

CLE Program presented by LeGaL & the Davis Polk LGBT Affinity Group

January 17, 2019, 6:30 to 8:30 p.m. | Davis Polk & Wardwell LLP

This program will cover the key federal and state court decisions and legislative developments of the past year, with some glimpses of what we might expect in 2019.

AGENDA

I. **6:30-6:40 p.m. – Welcome** (Eric Lesh, Executive Director of LeGaL)

II. **6:40-7:00 p.m. – *Masterpiece Cakeshop* and related cases on 1st Amendment exemption from Public Accommodation Laws** (Leonard)

III. **7:00-7:20 p.m. – Expanding LGBTQ Anti-Discrimination Protections under Title VII and Title IX** (Ezie)

IV. **7:20-7:40 p.m. – Transgender Military Ban Cases and Identification Documents Litigation** (Gonzalez-Pagan)

V. **7:40-8:00 p.m. – Post-*Obergefell* Marriage issues, including Retroactivity, Salience to Parenting, and New York cases** (Figlewski)

VI. **8:00-8:10 p.m. – Major foreign stories, including India Supreme Court sodomy decision** (Leonard)

VII. **8:10-8:15 p.m. – Prognosis for year ahead**

VIII. **8:15-8:30 p.m. – Questions and Answers**

LGBTQ Law 2018 Year In Review

Faculty Biographies

Professor Arthur S. Leonard @asleonard1

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

Chinyere Ezie, Esq. @ lawyergrrl

Chinyere Ezie is a Staff Attorney at the Center for Constitutional Rights, where she advocates for racial and gender justice; LGBTQI rights; and challenges governmental abuses of power. Prior to joining The Center for Constitutional Rights, Chinyere was a Staff Attorney at the Southern Poverty Law Center, where she brought cases defending the rights of LGBTQI Southerners, including trans prisoners' rights activist Ashley Diamond. She also served as a Trial Attorney at the U.S. Equal Employment Opportunity Commission where she litigated employment discrimination cases and secured a $5.1 million jury verdict on behalf of workers who were subjected to religious harassment.

Chinyere is a William J. Fulbright Scholar and a graduate of Yale University and Columbia Law School, where she was an Alexander Hamilton Scholar and served as Editor in Chief of the Journal of Gender and Law. She is a frequent speaker at law conferences and social justice convenings across the country. Her advocacy has also been reported on by the *New York Times*, *Washington Post*, MSNBC, *Al Jazeera*, and NPR, among others. She was also recognized as one of the nation's Best LGBT Lawyers Under 40 in 2016.

Omar Gonzalez-Pagan, Esq. @omargp

Omar Gonzalez-Pagan is a Senior Attorney at Lambda Legal, the oldest and largest national legal organization committed to achieving full recognition of the civil rights of LGBT people and everyone living with HIV. His work spans all aspects of Lambda Legal's impact litigation, policy advocacy, and public education efforts. As a member of the legal team in *Obergefell v. Hodges*, Omar helped secure the freedom to marry for same-sex couples across the United States. Omar has also played an instrumental role in advancing the rights of LGBT people under federal civil rights laws in education, employment, health care, and housing. He was co-counsel for Lambda Legal in the landmark decisions in *Hively v. Ivy Tech Community College* and *Zarda v. Altitude Express, Inc.*, the first and second appellate rulings in the country holding that Title VII covers sexual orientation discrimination.

Prior to joining Lambda Legal, Omar worked for the Commonwealth of Massachusetts as an Assistant Attorney General, a Special Assistant District Attorney, and an Associate General Counsel to the Commonwealth's Inspector General. Originally from Puerto Rico, Omar is a graduate from Cornell University and the University of Pennsylvania Law School.

Brett M. Figlewski, Esq. ***(Moderator)*** @lgbtbarny

Brett M. Figlewski, Esq., joined the LGBT Bar Association of New York (LeGaL) as its first Legal Director in 2015. A graduate of Vanderbilt Law School and Middlebury College, Brett worked for a decade with Sanctuary for Families as a family law litigator for LGBT victims of domestic violence and sex trafficking, including advocacy for Fair Access to Family Court and co-authorship of the article, "Trafficking and the Commercial Sexual Exploitation of Young Men and Boys," for the *Lawyer's Manual on Human Trafficking*. Brett oversees LeGaL's vital Helpline and network of drop-in clinics, which assist over 1000 members of the community each year; an attorney referral system and placement of *pro bono* cases; and education and outreach for the organization's members and the wider community. Brett was part of the legal team which represented Brooke B. in her landmark 2016 Court of Appeals case recognizing the rights of LGBT parents, and he continues to focus on litigation and advocacy for the full legal protection of LGBT families.

Significant Appellate Rulings by U.S. Federal & State Courts during 2018

Compiled by Professor Arthur S. Leonard, with assistance from Timothy Ramos, NYLS Class of 2019 (Research Assistant).

[Selective Inclusion of a Few Important Trial Court Rulings]

U.S. Supreme Court:

Rulings:

Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Commission, 138 S. Ct. 1719 (June 4, 2018). (Reversed the Colorado Court of Appeal on narrow grounds, holding that the state civil rights commission violated the 1st Amendment's Free Exercise Clause because the commission's treatment of the case of a baker who refused to design and produce a custom wedding cake for a same-sex couple displayed a clear and impermissible hostility towards his sincere religious beliefs. Supreme Court did not address any larger civil rights issues, but stated that states can forbid businesses from discriminating against customers because of their sexual orientation, and businesses with religious objections will generally have to comply with the non-discrimination laws.)

Arlene's Flowers, Inc. v. Washington, 138 S. Ct. 2671 (June 25, 2018) (Vacated the Washington Supreme Court's decision in State v. Arlene's Flowers, Inc., 187 Wash.2d 804 (Wash. Feb. 16, 2017), which held that the proprietor of a flower shop violated the Washington Law Against Discrimination and the state's Consumer Protection Act when she refused flowers for a same-sex wedding ceremony based on her religious beliefs. Remanded for further consideration in light of Masterpiece Cakeshop.)

Petitions for Certiorari Pending in LGBTQ-Related Cases

1. **Title VII Civil Rights Act of 1964**

   A. **Sexual Orientation Claims Under Title VII**

Bostock v. Clayton County Board of Commissioners, 723 Fed. Appx. 964 (11th Cir. May 10, 2018), petition for en banc review denied, 894 F.3d 1335 (11th Cir. July 18, 2018), petition for certiorari filed May 25, 2018, No. 17-1618 (Following circuit precedent disallowing sexual orientation claims under Title VII).

Zarda v. Altitude Express, 883 F.3d 100 (2d Cir. En banc, Feb. 26, 2018), petition for certiorari filed May 29, 2018, sub nom. Altitude Express v. Zarda, No. 17-1623 (Reversing circuit precedent, holding that sexual orientation claims are actionable as sex discrimination under title VII).

B. Gender Identity Claims Under Title VII

Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. March 7, 2018), petition for certiorari filed July 20, 2018, No. 18-107 (Holding that gender identity discrimination claims are actionable as sex discrimination claims under Title VII, and that a religious proprietor of for-profit funeral homes does not enjoy a statutory right under the Religious Freedom Restoration Act to discrimination based on gender identity).

2. Title IX Education Amendments Act Cases

Joel Doe v. Boyertown Area School District & Pennsylvania Youth Congress Foundation, 897 F.3d 518, 897 F.3d 515 (3rd Cir. 2018), petition for certiorari filed Nov. 21, 2018, No. 18-658, time to reply extended to Jan. 22, 2019. (challenge by cisgender students to school district's transgender-affirmative facilities access policy, rejected by court of appeals)

Kerr v. Marshall University Board of Governors, 735 Fed. Appx. 827 (Mem) (4th Cir. August 28, 2018), affirming 2018 WL 934614 (S.D. W.Va., Feb. 16, 2018), petition for certiorari filed Dec. 14, 2018, No. 18-780. (challenge to University's policy of denying teacher certification to LGBT students, decision below rejects case mainly on jurisdictional and procedural grounds).

3. Transgender Military Cases – Petition by Solicitor General to lift nationwide preliminary injunctions against implementation of exclusionary policy issued by all district courts in which such suits are pending

Trump v. Karnoski [Karnoski v. Trump, 2017 WL 6311305; 2018 WL 1784464, appeal pending, 9th Circuit], No. 18-676 (filed 11/23/2018).

Trump v. Jane Doe 2 [Jane Doe 2 v. Trump, 275 F. Supp. 3d 167, 315 F. Supp. 3d 474, appeal pending, D.C. Circuit], NO. 18-677 (filed 11/23/2018) [Note: When D.C. Circuit reversed the district court's ruling, the Solicitor General filed a letter with the Court asking it to "hold" this petition pending a possible motion for rehearing en banc by the respondents, but urged granting of petitions in the other two cases and granting of the motions to stay the injunctions in all three cases.]

Trump v. Stockman [Stockman v. Trump, 2017 WL 9732572, 2018 WL 4474768, appeal pending, 9th Circuit], No. 18-678 (filed 11/23/2018).

C. First Amendment Defenses to Public Accommodations Claims

Cervelli v. Aloha Bed & Breakfast, 142 Haw. 177 (Ct. App. Feb. 23, 2018); petition for certiorari denied by Hawaii Supreme Court, 2018 WL 3358586 (July 10, 2018), petition for certiorari filed in U.S. Supreme Court, sub nom. Aloha Bed & Breakfast v. Cervelli, No. 18-451 (Oct. 11, 2018), time for response extended to February 1, 2019 (lower courts held B&B violated public accommodations law by refusing services to lesbian couple).

Klein v. Oregon Bureau of Labor and Industries, 289 Or. App. 507 (Or. Ct. App. Dec. 28, 2017), review denied by Oregon Supreme Court, 363 Or. 224 (June 23, 2018), petition for certiorari docketed October 26, 2018, No. 18-547, time for response extended to January 25, 2019 (gay wedding cake case, commonly known as Sweet Cakes by Melissa; state authorities found refusal to make wedding cake for same-sex couple violated public accommodations law).

D. Fair Housing Act Sexual Orientation Claims

Wetzel v. Glen St. Andrew Living Cmty., LLC, 901 F.3d 856 (7th Cir. Aug. 27, 2018), petition for certiorari docketed November 14, 2018, sub nom. Glen St. Andrew Living Community LLC v. Wetzel, No. 18-626 (Lesbian resident of a rental facility for seniors may seek to hold the management of the facility accountable under the Fair Housing Act for the severe harassment against her by other residents due to her sexual orientation).

Certiorari Denials:

Barber v. Bryant, 860 F.3d 345 (5th Cir. 2017), cert. denied, 138 S. Ct. 652, 199 L. Ed. 2d 531 (2018), and cert. denied sub nom. Campaign for S. Equal. v. Bryant, 138 S. Ct. 671, 199 L. Ed. 2d 535 (2018) (both January 8, 2018). (Refusing to consider whether 5th Circuit incorrectly applied standing doctrine to dismiss lawsuits challenging the constitutionality of Mississippi HB. 1523, which protects people with anti-gay and anti-transgender views from adverse action by the state or local governments, and allows them to bar transgender people from using gender-labeled public facilities inconsistent with the sex indicated on their birth certificates).

Day, Inquiry Concerning a Judge re: the Honorable Vance D. Day, 413 P.3d 907 (Oregon Sup. Ct., March 15, 2018), cert. denied, sub nom. Day v. Oregon Commission, 139 S. Ct. 324 (Oct. 9, 2018) (refusing to review Oregon Supreme Court ruling accepting disciplinary sanctions for judge who, inter alia, refused to conduct same-sex weddings).

Doe v. Holcomb, 883 F.3d 971 (7th Cir. 2018), cert. denied, 2018 U.S. LEXIS 4477 (Oct. 1, 2018) (rejecting appeal of 7th Circuit ruling that state officials enjoy immunity from facial challenge to Indiana law limiting ability to obtain legal name changes to those who are citizens).

McLaughlin v. Jones in & for County of Pima, 243 Ariz. 29, 401 P.3d 492 (Ariz. 2017), cert. denied sub nom. McLaughlin v. McLaughlin, 138 S. Ct. 1165 (Feb. 26, 2018) (straightforward application of Pavan v. Smith by Arizona Supreme Court, finding that both spouses in a lesbian

couple are legal parents of a child borne by one of them during the marriage).

Rhines v. South Dakota, 138 S. Ct. 2660, 201 L. Ed. 2d 1058 (June 18, 2018) (Refused to examine claim by gay death row inmate that his conviction stemmed from anti-gay bias by the jury, included reports from jurors that there was discussion about how Rhines would enjoy a life sentence because of all the young men who would be available to him in prison). See also Rhines v. Young, 2018 WL 2390130 (D.S.D. May 25, 2018), petition for writ of habeas corpus denied, Rhines v. Young, 899 F.3d 482 (8th Cir. Aug. 3, 2018).

Certiorari Dismissals:

Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ., 858 F.3d 1034 (7th Cir. 2017), cert. dismissed sub nom. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ. v. Whitaker ex rel. Whitaker, 2018 WL 1147062 (Mar. 5, 2018) (as part of settlement after 7th Circuit upheld transgender student's Title IX and Equal Protection claims, Kenosha School District withdrew its petition for certiorari).

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Criminal Law

Erotic Service Provider Legal Education & Research Project v. Gascon, 880 F.3d 450 (9th Cir. Jan. 17, 2018), amended to clarify legal test, 881 F.3d 792 (9th Cir. Feb. 2. 2018) (Rejecting constitutional challenge to California's criminal law against prostitution).

Green v. Georgia, 882 F.3d 978 (11th Cir. Feb. 9, 2018) (Rejected Green's challenge to recent conviction for failing to register as a sex offender as required by his sentence. Green pled guilty to a sodomy charge in 1997, under state sodomy law subsequently invalidated by Georgia Supreme Court in a case of private acts of consenting adults in Powell v. State. Court found petitioner's sexual act was not fully private, and thus not protected under Powell and Lawrence v. Texas. Green had engaged in oral sex with a 16-year-old male while two women were present in the room. For sexual conduct to be deemed private, only two people engaged in the activity may be present and group sex does not count.)

Lewis v. State of Indiana, 2018 WL 6837079, 2018 Ind. App. Unpub. LEXIS 1573 (Dec. 31, 2018) (affirming sentence for man convicted of assault on transgender woman).

People v. Padilla, 2018 WL 6177734, 2018 Cal. App. Unpub. LEXIS 7942 (Cal. App., 2nd Dist., Nov. 27, 2018) (affirms jury verdict for domestic violence against a man who assaulted a transgender woman with whom he had a relationship).

United States v. Johns, 2018 WL 6703465, 2018 U.S. App. LEXIS 35543 (U.S. Ct. App., 6th Cir., Dec. 19) (complex kidnapping scenario involving a lesbian abducting her former partner).

Disability & Health Insurance Claims & Eligibility

Atkins v. Willkie, 2018 WL 4380801, 2018 U.S. App. Vet. Claims LEXIS 1235 (Sept. 14, 2018) (vacating decision by Board of Veterans' Appeals that rejected a claim for service-connected HIV infection, a prerequisite for federal military benefits for applicant's condition).

Souden v. Pacificare Life & Health Insurance Co., 2018 WL 4443119, 2018 Cal. App. Unpub. LEIS 6372 (Cal. Ct. App., 2nd Dist., Sept. 18, 2018) (surviving same-sex domestic partner of insured was not bound by arbitration clause to arbitrate his claim under health insurance contract, because he was not a party to the contract; the insured's agreement to arbitrate disputes did not bind other claimants under the policy).

Educational Institution Discrimination (Title IX, Constitutional & Tort Claims)

Adams by & through Kasper v. Sch. Bd. of St. Johns Cty., Fla., 318 F. Supp. 3d 1293 (M.D. Fla. 2018), appeal filed (11th Cir. Aug. 24, 2018) (holding, after trial, that school board's policy prohibiting transgender boy from using the boys' restrooms violated Fourteenth Amendment's Equal Protection Clause and Title IX)

Doe by & through Doe v. Boyertown Area Sch. Dist., 897 F.3d 518 (3d Cir. July 26, 2018), petition for certiorari filed, Nov. 21, 2018, No. 18-658, pending. (Denying the appellants' motion for a preliminary injunction to block the school district's unwritten policy of allowing transgender students to use bathrooms and changing room facilities consistent with their gender identity.)

Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. March 7, 2018), petition for certiorari filed July 20, 2018, sub nom. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (6th Circuit held Title VII ban on sex discrimination includes claims of discrimination because of gender identity, and Religious Freedom Restoration Act does not provide a defense for an employment discrimination case involving a for-profit business employer).

Grimm v. Gloucester Cty. Sch. Bd., 302 F. Supp. 3d 730 (E.D. Va. May 22, 2018); appeal filed on June 6, 2018 (on remand from 3rd Circuit and Supreme Court, denies motion to dismiss Title IX and 14th Amendment claim by transgender high school alumnus concerning access to gender-appropriate restrooms; gender identity discrimination actionable under Title IX).

Parents for Privacy v. Dallas Sch. Dist. No. 2, 326 F. Supp. 3d 1075 (D. Or. 2018), appeal filed (9th Cir. Aug. 23, 2018) (dismissing claims that high school's policy of allowing transgender students to use restrooms, locker rooms, and showers that matched their gender identity violated the Due Process Clause, Title IX, the First Amendment's Free Exercise Clause, and Oregon law)

Stopford v. Milton Town School District, 2018 VT 120, 2018 Vt. LEXIS 199, 2018 WL 6005260 (Nov. 16, 2018) (affirms ruling granting summary judgment to school district sued after suicide of student who had been subjected to a homophobic physical assault by other students who were also members of the high school football team).

Employment Discrimination - Civilian

Anonymous v. Mount Sinai Hospital, 2018 N.Y. App. Div. LEXIS 6157, 2018 N.Y. Slip Op 06212 (Sept. 25, 2018) (affirming summary judgment for employer in HIV discrimination claim, where there was no evidence employer knew plaintiff was HIV-positive when he was dismissed for excessive absences).

Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. May 10, 2018), petition for cert. filed May 25, 2018. (Rejecting gay plaintiff's appeal of dismissal of sexual orientation discrimination claim under Title VII; holding such claims not actionable under circuit precedent without analyzing the question.)

Camacho v. Target Corp., 24 Cal. App. 5th 291, 234 Cal. Rptr. 3d 223 (2018). (Because unlawful sexual harassment does not fall with normal scope of employment, a gay man's employment discrimination claim is not collaterally estopped by his settlement of a Workers Compensation claim for physical injuries arising from the same course of events.)

Cargian v. Breitling USA, Inc., 2018 WL 4293325, 2018 U.S. App. LEXIS 25518 (U.S. Ct. App., 2nd Cir., Sept. 10, 2018) (reviving gay man's Title VII sex discrimination case, which trial court dismissed on summary judgment prior to 2nd Circuit's en banc ruling in Zarda v. Altitude Express holding sexual orientation discrimination claims could be asserted under Title VII.

Christie v. Crawford Cty. Mem'l Hosp., 2018 Iowa App. LEXIS 628, 2018 WL 3471835 (Ct. App. July 18, 2018). (Reversed summary judgment against gay EMT-paramedic who claimed that hospital had subjected him to sexual orientation discrimination, retaliated against him after he filed an earlier complaint with the Iowa Civil Rights Commission, and violated public policy for firing him for reporting the hospital for hiring a paramedic who lacked the proper licensure.)

Duplan v. City of N.Y., 888 F.3d 612 (2d Cir. Apr. 30, 2018). (Gay African-American man who works at the Administration Unit of New York City's Bureau of HIV/AIDS Prevention and Control sued the city under 42 U.S.C. § 1981 and Title VII claiming hostile environment discrimination, sex and race discrimination and retaliation. He claims he was retaliated against after complaining to the EEOC in 2011 for the denial of a promotion, complaining about discrimination, and being effectively demoted. In his 2014 EEOC charge, Duplan claimed that his supervisors continued to ostracize him between 2011 and 2014. The 2nd Circuit pared down the case to Duplan's Title VII retaliation claims respecting alleged adverse actions that occurred within 300 days before, or shortly after, he filed his 2014 EEOC charge. The court also discussed the exhaustion requirements under Title VII and how they can be applied to retaliation claims based on employer conduct after an EEOC charge has been filed. By doing so, the 2nd Circuit aligned with the unanimous view by other circuits.)

EEOC v. United Health Programs of America, Inc. et al, 1:14-cv-03673-KAM-JO (E.D.N.Y. Dec. 28, 2018) (returning $5.1 million jury verdict for employees who were subjected to coerced religious practices and issuing comprehensive injunction).

Franchina v. City of Providence, 881 F.3d 32 (1st Cir. Jan. 25, 2018) (Affirming a Title VII jury verdict for lesbian firefighter who won her claim of hostile environment sexual harassment and retaliation, ruling that sexual orientation issues can be introduced under a "sex-plus" case, a type of gender discrimination claim where an employer classifies employees on the basis of sex plus

another characteristic, thus getting around circuit precedent rejecting sexual orientation claims under Title VII).

Fuller v. Advanced Recovery, Inc., 2018 WL 6725325, 2018 U.S. Dist. LEXIS 215098 (U.S. Dist. Ct., S.D.N.Y., Dec. 20, 2018) (Court awarded attorney's fees under Title VII to transgender plaintiff who was prevailing party in action before NY State Division of Human Rights, mentioning defendant's counsel's argument (which it characterized as irrelevant) that plaintiff was somehow not a full prevailing party because the Appellate Division, 2nd Department's affirmation of the agency determination did not mention that the case involved gender identity discrimination, at a time when it is still not definitely established in judicial precedent that the NY State Human Rights Law covers gender identity discrimination claims. As a result of counsel's argument, the federal opinion mentions that it is a transgender discrimination case, which will make it findable for those seeking cases on the subject in electronic databases!).

Harrington v. City of N.Y., 157 A.D.3d 582 (N.Y. App. Div., 1st Dept. Jan. 23, 2018) (Improper to find gay police officer's past discrimination suit as psychologically disqualifying to be a police officer; NYPD's bias against people who assert their rights in employment discrimination cases is improper).

Louisiana Dep't of Justice v. Edwards, 2017-2020 (La. 03/23/18), 239 So. 3d 824 (La. Sup. Ct., March 23, 2018) (Without issuing an opinion, Louisiana Supreme Court refused to review or overrule a decision invaliding Governor Edward's executive order banning LGBT discrimination in the state government. Partially dissenting, Chief Justice Johnson stated that the rulings below adopted an unreasonably restrictive view of executive authority and of the separation of powers envisioned by the state constitution).

Newton v. Alameda-Contra Costa Transit Dist., 2018 Cal. App. Unpub. LEXIS 2177, 2018 WL 1516822 (Ct. App., 1st Dist. Mar. 28, 2018) (Employee suffering from HIV/AIDS could not prevail on disability discrimination claim because she had gone on record as being unable to work).

Wittmer v. Phillips 66 Co., 304 F. Supp. 3d 627 (S.D. Tex. Apr. 4, 2018), appeal pending in the 5th Circuit (Ruled that Title VII protects individuals from employment discrimination on the basis of gender identity. Wittmer, a transgender woman, alleged that her employment offer was rescinded due to her transgender status. The company claimed that it did so because of inconsistencies in her background check and her unsolicited emails to human resources. On appeal, Phillips 66 does not contest the application of Title VII – and its own in-house policy forbids gender identity discrimination, as is common among large corporate employers – but argues that it had a non-discriminatory justification for rescinding the offer).

Zarda v. Altitude Express, Inc., 883 F.3d 100 (2d Cir. Feb. 26, 2018), petition for certiorari pending (holding, en banc, that Title VII covers sexual orientation discrimination claims).

Employment Discrimination – Military

Doe 2 v. Trump, 315 F. Supp. 3d 474, 319 F. Supp. 3d 539 (D.D.C. Aug. 6, 2018) (denying government's motion to dissolve preliminary injunction, dropping President Trump as individual defendant), rev'd sub nom. Jane Doe 2 v. Shanahan, In His Official Capacity As Acting Secretary Of Defense, No. 18-5257, 2019 WL 102309 (D.C. Cir. Jan. 4, 2019); 322 F. Supp. 3d 92 (D.D.C. Aug. 24, 2018) (denying cross-motions for summary judgment) (Developments in lawsuit challenging Trump's ban on transgender military service; district court's refusal to dissolve preliminary injunction was reversed and vacated by D.C. Circuit on January 4, 2019), petition for certiorari [before judgment] pending for Supreme Court conference of January 11, 2019. Solicitor General asked the Court to place cert. petition "on hold" as a result of D.C. Circuit's ruling, pending possible motion for rehearing en banc by the Respondents, and noting that because of preliminary injunctions in three other pending cases challenging the ban, the D.C. Circuit's action did not give the government the relief it was seeking).

Karnoski v. Trump, 2018 U.S. Dist. LEXIS 28108, 2018 WL 993973 (W.D. Wash. Feb. 21, 2018)(denying the government's motion to extend time for responding to the plaintiff's motion for summary judgment), order denying motion to lift preliminary injunction, 2018 U.S. Dist. LEXIS 63563, 2018 WL 1784464 (W.D. Wash. Apr. 13, 2018), order to show cause regarding motion to stay, 2018 U.S. Dist. LEXIS 90248 (W.D. Wash. May 30, 2018), order denying motion to lift preliminary injunction, 2018 U.S. Dist. LEXIS 100789 (W.D. Wash. June 15, 2018), order granting motion to compel and denying motion for protective order, 328 F. Supp. 3d 1156 (W.D. Wash. July 27, 2018), order granting motion for additional and separate argument times, 2018 U.S. App. LEXIS 27849 (9th Cir. Oct. 1, 2018) (Developments in lawsuit challenging President Trump's policy decision to ban military service by transgender individuals; preliminary injunction issued during 2017 was reaffirmed, the court rejected summary judgment motions by all parties and refused to dissolve the preliminary injunction, rejecting the government's argument that a "new" policy announced by Defense Secretary Mattis was other than an implementation of the policy announced by Trump; appeal pending at the 9th Circuit; in the course of litigation, court held that gender identity is a suspect classification and that plaintiffs were likely to prevail on their claim that the policy violates equal protection under the 5th Amendment; litigation over discovery, in which the government is resisting responding to requests concerning the decisional process behind the revocation of prior policy and substitution of exclusionary policy; Solicitor General filed a petition for certiorari in advance of judgment, seeking to by-pass the 9th Circuit, which was scheduled for consideration at the Supreme Court's January 11 conference).

Stockman v. Trump (U.S. Dist. Ct., C.D. Calif.), appeal of district court's refusal to dissolve or stay preliminary injunction against Trump's ban on transgender military service pending before 9th Circuit Court of Appeals; Solicitor General's petition for certiorari before judgment and motion to stay preliminary injunction pending for consideration by Supreme Court at its January 11 conference).

Stone v. Trump, 335 F. Supp. 3d 749 (D. Md., August 14, 2018) (motion to compel discovery granted) (Developments in lawsuit challenging Trump's ban on transgender military service; government's motion to dissolve preliminary injunction pending).

HIV Exposure Liability

Propes v. State, 346 Ga. App. 116, 815 S.E.2d 571 (June 1, 2018). (Reversed the conviction of a man sentenced to 10 years after a jury found him guilty of engaging in sexual intercourse without disclosing his HIV-positive status. Evidence presented by the State was insufficient to convict him, even though he admitted being HIV-positive. The statute's definition of "HIV infected person" requires that the person be determine to be infected by at least two separate HIV tests approved by Georgia's Department of Community Health. Here, the only evidence of Propes' HIV status was a one-page laboratory testing report from Indiana that failed to satisfy the DCH's regulations or licensing requirements. The State also failed to introduce testimony by a physician or other competent witness to explain the test report's origin, methodology, meaning, or how it satisfied Georgia's standard for determining with someone is an "HIV infected person.")

State v. Person, 2018 Tenn. Crim. App. LEXIS 32, 2018 WL 447122 (Tenn. Crim. App. Jan. 16, 2018). (Vacating jury conviction on charges of criminal exposure to HIV. The court found that the trial court's decision to grant joinder to the previously separate trials for rape and HIV exposure was erroneous and denied Person his ability to conduct a defense. However, the appellate court approved the trial court's ruling on admission of the Health Department records, and rejected the defendant's argument that the evidence at trial was not sufficient to sustain a conviction on the HIV exposure count. The appellate court found that the state met the burden of establishing that ejaculating into the mouth and vagina of the victim presented a significant risk of HIV transmission as required by statute. Person allegedly raped a female victim after she accepted a ride home in his car.)

State v. Whitfield, 2018 Wash. App. LEXIS 43, 2018 WL 332967 (Wash. Ct. App. Jan. 9, 2018). (affirming a decision to deny the defendant's motion for DNA testing of HIV-positive blood drawn from five of seventeen female victims who tested positive after having unprotected sex with him. Conviction only required proof of exposure, not proof of transmission. Whitfield argued testing would show that the five women were not infected with the same strain of the virus that he had. However, the statute only allows testing if the evidence is material to identifying the perpetrator or to sentence enhancements).

State v. Woods, 2018 La. App. Unpub. LEXIS 396 (La. Ct. App., 1st Cir., Dec. 21, 2018) (affirmed sentence of 10 years of hard labor for HIV-positive man who exposed his rape victim to possible infection).

Housing Discrimination

Wetzel v. Glen St. Andrew Living Community, LLC, 901 F.3d 856 (7th Cir. Aug. 27, 2018), petition for cert. docketed (U.S. Nov. 14, 2018) (Lesbian resident of a rental facility for seniors may seek to hold the management of the facility accountable under the Fair Housing Act for the severe harassment against her by other residents due to her sexual orientation).

Identity Documents (Birth Certificates, Passports, Gender Identity, Parentage, Name Changes)

Arroyo Gonzalez v. Rossello Nevares, 305 F. Supp. 3d 327 (D.P.R. 2018) (holding that Puerto Rico's prohibition on transgender people's ability to correct the gender marker on their birth certificates to be consistent with their gender identity violated the Fourteenth Amendment's Due Process Clause by violating transgender person's information and decisional privacy rights)

Chaisson v. State, 239 So. 3d 1074 (La. App. 4 Cir., 03/7/18), 239 So. 3d 1074. (Applied Obergefell retroactively to uphold a revised birth certificate for a child born during the marriage of a lesbian couple.)

Doe v. Holcomb, 883 F.3d 971 (7th Cir. 2018), cert. denied, No. 17-1637, 2018 U.S. LEXIS 4477 (Oct. 1, 2018) (dismissing suit against Indiana state officials challenging constitutionality of citizenship requirement for name-change applications on immunity grounds; court suggests plaintiff should apply for a name-change, get turned down, and raise constitutional claims in a state court appeal against the officials who denied the name change).

F.V. v. Barron, 286 F. Supp. 3d 1131 (D. Idaho 2018) (holding that Idaho's prohibition on transgender people's ability to correct the gender marker on their birth certificates to be consistent with their gender identity violated the Fourteenth Amendment's Equal Protection Clause)

Riley, Petitioner, 93 Mass. App. Ct. 1103, 103 N.E.3d 767 (Mar. 21, 2018) (Vacated a denial of a name change for a transgender inmate who was serving a life sentence without parole for first degree murder by extreme atrocity or cruelty. The lower court based its denial on Verrill, Petitioner, 600 N.E.2d 697 (Mass. App. 1996), on the basis that the name change could result in confusion in the criminal justice recordkeeping system. However, the court has noted since then that the ability to track persons on parole has been improved by increased computerization. Furthermore, Riley is not eligible for parole, so the district attorney's objection on public safety grounds is untenable).

Zzyym v. Pompeo, 2018 U.S. Dist. LEXIS 160018, 2018 WL 4491434 (U.S. Dist. Ct., D. Colo., Sept. 19, 2018) (State Department ordered to issue gender-neutral passport with "x" gender designation for citizen who does not identify as either male or female; Department's arbitrary refusal to allow third category for those who reject gender binary is arbitrary and capricious in violation of the Administrative Procedure Act; government filed appeal in 10th Circuit).

Jury Selection

Morgan v. State, 416 P.3d 212 (Nev. May 3, 2018) (Nevada Supreme Court aligned itself with the 9th Circuit's decision in SmithKline Beecham Corp. v. Abbott Laboratories, 740 F.3d 471 (9th Cir. 2014), holding that a prosecutor's use of peremptory challenges for the purpose of keeping gay people off a criminal trial jury could be the basis of a Batson-type challenge to the fairness of the trial process).

Patrick v. State, 246 So. 3d 253 (Fla. June 14, 2018). (The plaintiff, was convicted in 2009 for kidnapping, robbery, and first-degree murder of a gay senior, Schumacher. In 2005, homeless Patrick met Schumacher underneath a park pavilion, took him home, and the two attempted anal

sex. Patrick bludgeoned Schumacher, tied him up, took his money and items, and left him to die. In petition for habeas corpus, Patrick claims he received ineffective assistance of counsel for failing to challenge a potential juror for cause. During voir dire, juror stated he would be biased if he knew the defendant was a homosexual, and believed that homosexuals are morally depraved enough to lie, steal, and kill. Florida Supreme Court rejected State's challenge to Patrick's petition, holding that evidence and arguments at trial indicated that while Patrick denied being homosexual, he willingly participated in sexual and intimate acts with the male victim, and that he engaged in similar activity in the past with other men. Thus, the Court concluded the juror's voir dire answers concerning homosexuality met the test for establishing prejudice and defense counsel's failure to challenge the juror justified reversing the post-conviction court's denial of this claim and to remand for an evidentiary hearing).

Marital Status, Civil Unions, Domestic Partners

In re Gigi Cowell, Public Administrator of County of New York v. Carrier, 158 A.D.3d 546, 2018 WL 943198 (N.Y.A.D. 1 Dept. Feb. 20, 2018) (Court rejected objections of a lesbian's biological family to the distribution of her estate to heirs of her former partner, who had adopted Gigi when same-sex marriage was not available in New York. One consequence of adoption was that the adoptee's legal family relationship with her original biological family was cut off. Thus, if the adopted person died without a will, her estate is distributed through her adoptive family rather than her biological one.)

G.C. & R.W., In re Marriage, 23 Cal. App. 5th 1, 232 Cal. Rptr. 3d 484 (Ct. App. May 9, 2018). (New Jersey Domestic Partnerships [NJDP] are not substantially equivalent to California Registered Domestic Partnerships; rejecting a same-sex spouse's claim that trial court in divorce action erred by declaring the date of the couple's union to be the date they legally wed in Connecticut in 2009 rather than the 2004 date they entered into a NJDP. California extended the same rights and responsibilities as does marriage to CA RDPs, while New Jersey only extended certain rights and responsibilities to couples entering into NJ DPs).

Grant v. Anderson, 2018 Tenn. App. LEXIS 285, 2018 WL 2324359 (Tenn. Ct. App. May 22, 2018) (Stupid litigation to make a political point. Ministers and lay people unsuccessfully claimed that because Tennessee statutes governing issuance of marriage licenses mention the "contracting parties" as male and female, these provisions were unconstitutional under Obergefell so there was no longer any statutory authorization to issue marriage licenses to anybody).

Hogsett & Neale, In re Marriage of, 2018 COA 176 (Colo. Ct. App., Dec. 13, 2018) (holding that Obergefell could be applied retroactively to determine whether a same-sex couple was married under Colorado's common law marriage doctrine, and that the factors used to evaluate the status of the relationship could be adapted to the circumstances of a same-sex couple living together prior to the arrival of marriage equality in the state; however, finding on the facts that the couple in question did not have a common law marriage).

O'Reilly-Morshead v. O'Reilly-Morshead, 163 A.D.3d 1479, 83 N.Y.S.3d 379 (App. Div., 4th Dept. July 25, 2018) (Property acquired during a civil union was subject to equitable distribution of the civil union; however, the court maintained that civil unions are not legally equivalent to marriages in New York. Deborah and Christine, New York residents, traveled to Vermont and

entered into a civil union in 2003. Although the Appellate Division held that the lower court had properly refused to treat their civil union as equivalent to a marriage for the purposes of equitable distribution under the Domestic Relations Law, the court found that comity principles should apply in this case; under the common law principle of comity, a state defers to the laws of the state where a marriage took place).

Smith v. Bell, 346 Ga. App. 152, 816 S.E.2d 698 (June 7, 2018). (Affidavits may provide the basis for finding an enforceable oral agreement of an unmarried same-sex couple regarding disposition of property acquired during their relationship).

Wilson v. Fisher (In re Estate of Wilson), 913 N.W.2d 273 (Iowa Ct. App. Feb. 7, 2018). (Rejected Wilson's attempt to get courts to hold that a provision in his late sister's will leaving her entire estate to her long-time same-sex partner, Fisher, was automatically revoked when the women allegedly split up nine years before the sister's death. Iowa's Probate Code § 633.271(1) would only revoke such a bequest if a marriage was "dissolved" in a court action, of which there was no record. The women were "married" in Colorado in 1991 in a non-legal ceremony. The parties stipulated that the women were married in Colorado. The court rejected Wilson's contention that "dissolution" referred to an informal voluntary termination without involving the courts. Instead, the court found that the legislature meant for "dissolution" to be synonymous with "divorce").

Parental Standing & Status Issues (including Custody & Visitation)

C.G. v. J.H., 2018 WL 4537278, 2018 Pa. LEXIS 4952 (Pa. Supreme Ct., Sept. 21, 2018) (Finding unmarried lesbian co-parent lacked standing to seek custody or visitation with child conceived by donor insemination during her relationship with birth mother, despite her fulfilling parental role with child for the first five years of child's life; co-parent is not recognized as a legal parent under the Domestic Relations Code, which does not have an express definition of "parent").

Cervantes v. Goldman, 2017 Ariz. App. Unpub. LEXIS 1804, 2017 WL 5593483 (Ariz. Ct. App. Nov. 21, 2017). (Enforcing all but one provision of a negotiated visitation agreement for the child of an unmarried, now-separated lesbian couple).

Christopher YY. v. Jessica ZZ., 159 A.D.3d 18 (N.Y. App. Div., 3rd Dep't, Jan. 25, 2018). (A sperm donor to a lesbian married couple was equitably estopped from seeking a paternity determination regarding the child conceived using his sperm, countermanding a ruling by Chemung County Family Court that genetic testing be done to confirm the petitioner's biological fatherhood.)

Dee J., In re, 422 Ill. Dec. 495, 103 N.E.3d 627 (Il. App., 2nd Dist. Apr. 27, 2018) (that Ashlie—the wife of a woman who gave birth to a child conceived through donor insemination at a time when Illinois did not yet recognize out-of-state same-sex marriages—was nonetheless a legal parent of the child. Ashlie and Dee separated seven months after A.M.J. was born; the women agreed to have a child together, included both their names on the birth certificate, and Ashlie actively participated in parenting the child prior to the separation. The appellate court dismissed Dee's argument that the trial court failed to conduct a "best interest of the child" analysis; that

analysis applies to custody and visitation determinations, not to the question whether somebody is a legal parent).

Delaney v. Whitehouse, 2018 WL 6266774, 2018 Ky. App. Unpub. LEXIS 844 (Ky. Ct. App., Nov. 30, 2018) (rejecting lesbian co-parent custody/visitation claim, partly on ground that couple did not marry when it became possible under Obergefell for them to do so, in a ruling that appears to cut back from Kentucky's important precedent in Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010), which had allowed such co-parent claims to go forward. Concurring opinions suggest the Kentucky Supreme Court should abandon Mullins in light of the availability of same-sex marriage).

DeMarc v. Goodyear, 163 A.D.3d 1430, 80 N.Y.S.3d 818 (N.Y. App. Div., 4th Dep't. July 6, 2018) (ordering reconsidering of second-parent claims in light of Court of Appeals decision in Brooke S.B. v. Elizabeth A.C.C., 28 N.Y.3d 1 (2016). Reaffirming importance of equitable estoppel principles in suit between biological mother and second-parent).

Ezell v. Tapia, 2018 WL 3062108 (Ariz. Ct. App. June 21, 2018) (Statutory presumption of parentage applies to same-sex spouses in light of Obergefell, and a parent may be equitably estopped from rebutting the presumption of parentage).

Hawkins v. Grese, 68 Va. App. 462, 809 S.E.2d 441 (Feb. 13, 2018). (Same-sex partner lacked standing to assert parental rights towards child whose conception was planned during non-marital relationship; rejecting Juvenile Court ruling, awarding sole legal custody to biological parent; holding state had rational basis to limit parental rights to biological or adoptive parents, in absence of proof that legal parent was unfit).

J.S. v. M.C., 107 N.E.3d 1118 (Ind. Ct. App. July 25, 2018) (unanimously affirmed decisions denying third-party visitation to former lesbian petitioner in a case regarding fraternal twins. While together, Petitioner and Mother experienced a number of failed attempts to conceive a child, which took a toll on their relationship and led to their breakup. Mother decided to become a single parent and continued IVF treatment. By the time twins were born, Mother and Petitioner resumed a friendship; Petitioner stayed over several nights per week and took care of the twins on a daily basis. In order to be eligible for third-party visitation, Petitioner had to: (1) demonstrate the existence of a custodial and parental relationship with the children; and (2) subsequently show that visitation would be in the best interest of the children. Court concluded that Petitioner failed to meet the first requirement as Mother intended to raise twins as a single parent. Also, Petitioner maintained separate residence, did not provide financial assistance, and was only one of a number of people who helped care for twins.)

K.G. v. C.H. (a/k/a Gunn v. Hamilton), 163 A.D.3d 67, 79 N.Y.S.3d 166 (App. Div., 1st Dept. June 26, 2018). (Appellate Division remanded for an equitable estoppel hearing. Gunn and Hamilton sought an international adoption, but it was not finalized until they had separated and Hamilton is adoptive parent. Gunn remained involved and sought legal parental status when Hamilton planned to move with child to England. The Appellate Division, First Department clarified a number of important aspects of Court of Appeals' ruling in Brooke S.B., which declined to adopt an estoppel test, but explicitly recognized that different legal principles could be brought to confer standing under on different facts. Agreed with trial judge that a pre-conception or pre-adoption agreement does not remain in perpetuity once made; thus, he

permissibly denied that the parties' mutual intention to raise an adopted child together survived the end of their romantic relationship. However, unequivocally held that a full hearing on relevant factors was essential to any final determination of parentage, thus remanding the case to the trial court for a continued hearing on equitable estoppel, emphasizing the importance of assessing the best interests of the child by means of appointment of an attorney for the child or a forensic expert, or by conducting a Lincoln hearing. The court focused on the absence of the child's voice from the record exemplified its understanding that equitable considerations must be paramount in any proceeding which purports to determine the best interests of a child.)

L.M. V. C. McG., 2018 Pa. Super. Unpub. LEXIS 3625, 2018 WL 4656473 (Pa. Superior Ct., Sept. 28, 2018) (affirms trial court's handling of custody/visitation disputes between former partners who had children through donor insemination under unusual circumstances; one is transgender woman, the other is cisgender woman; both are biological parents because the transgender woman banked her sperm prior to transition, which was subsequently used to impregnate her partner. Joint legal custody affirmed).

M.L., In the Interest of, 2018 Iowa App. LEXIS 516, 2018 WL 2725407 (Ct. App. June 6, 2018) (In case of child born to married lesbian couple in 2013, upholding juvenile court's determination to terminate incarcerated birth mother's parental standing in favor of other legal mother, in light of birth mother's involvement in substance abuse, domestic violence, and continued misbehavior).

Martinez v. Martinez, 2018 Ky. App. Unpub. LEXIS 60, 2018 WL 671306 (Ky. Ct. App. Feb. 2, 2018). (Affirming family court's decision to award sole custody of V.M. to her mother, with limited supervised (and no overnight) visitation for the child's bisexual father. The father's appeal argued the trial court should not have allowed into evidence his emails demonstrating his solicitation of sexual partners on Craigslist. The court allowed the emails because they were not introduced to prove their content, but instead to prove that they were sent at a time when the child was not present. The appellate court held that even if it was an error, it did not affect the father's substantial rights because the court supposedly did not base its rulings on the email contents).

McLaughlin v. Jones in & for County of Pima, 243 Ariz. 29, 401 P.3d 492 (Ariz. 2017), cert. denied sub nom. McLaughlin v. McLaughlin, 138 S. Ct. 1165 (Feb. 26, 2018) (straightforward application of U.S. Supreme Court's decision in Pavan v. Smith by Arizona Supreme Court, finding that both spouses in a lesbian couple are legal parents of a child borne by one of them during the marriage).

N.A.H. v. J.S., 188 A.3d 534 (Pa. Super. Ct. Mar. 16, 2018) (affirming trial court's order granting a petition for paternity and genetic testing for N.A.H., a gay male sperm donor in dispute with J.S. and P.K., a lesbian mother and her spouse. Although an oral contract governing sperm donation could be enforceable, the lack of evidence of any meeting of the minds over the status of the parties left an opening for the sperm donor to seek parental status. The court did not consider the marital presumption, perhaps because a known donor participated).

N.B. v. Superior Court, 2018 WL 948508 (Cal. Ct. App. Feb. 20, 2018) (N.B. and K.B., former lesbian partners contested who would retain custody and ultimately be able to adopt four foster children who had been placed with them while they were living as a couple. Court of Appeal

approved the superior court's ratification of county officials' conclusion that it was in the best interest of the children to keep them together under the foster care of K.B., with whom they had bonded, and who was designated as a prospective adoptive parent, and to provide a limited visitation schedule with N.B. The court rejected N.B.'s contention that she was denied due process or was prejudiced because she was in a same-sex relationship).

T.N.; H.R.-D. & E.R.-D., Petitioners, 2018 Cal. App. Unpub. LEXIS 8399, 2018 WL 6522136 (Ct. Appeal, 1st Dist., Dec. 12, 2018) (petitioners failed to show that County officials' decision not to return children they had been fostering to their custody after permanent placement with material grandparents did not work out was due to their sexual orientation or same-sex couple status; court deferred to agency judgment that alternative placement was in best interest of children due to agency's evaluation of problems with petitioners' relationship).

Joseph O. v. Danielle B., 158 A.D.3d 767, 71 N.Y.S.3d 549 (N.Y. App. Div., 2nd Dept. 2018) (Ordered dismissal of sperm donor's attempt to establish parentage and get legal visitation with a child born to a married lesbian couple. The couple used the Internet to find a sperm donor, rather than undergo a procedure done by "a person duly authorized to practice medicine," which is required to create a non-rebuttable presumption that a married couple are the only legal parents of the child under N.Y. Domestic Relations Law § 73; the couple's child was then born in April 2012. Even though the couple did not comply with § 73, the court found that equitable estoppel barred Joseph's lawsuit because he had no meaningful relationship with the child and had waited more than three years since the child's birth to assert parental rights).

John P. v. Superior Court, 2018 Cal. App. Unpub. LEXIS 2233, 2018 WL 1614291 (Ct. App., 2nd Dist. Apr. 3, 2018). (Denied gay father's petition to review trial court's decision to end reunification services between with son and father's same-sex partner. Father contended the Social Services Department was against him because he is gay and unmarried. SSD contended infant son was removed upon finding household environment was unsafe, that father's partner was struggling with drug and alcohol dependencies, and that strangers were drifting through the house and drug use was going on.)

J.R.P. and J.A.P., Alleged Dependent Children, 2018-Ohio-3938, 2018 Ohio App. LEXIS 4303, 2018 WL 4677520 (Ohio Ct. App., 7th Appellate District, Sept. 27, 2018) (trial court did not abuse its discretion in awarding custody of children whose biological parents had proved incapable of caring for them responsibly to gay father of children's mother and father's same-sex spouse, as providing the preferable home for the children).

Sheardown v. Guastella, 324 Mich. App. 251, 920 N.W.2d 172 (2018). (Eschewing any consideration of the best interest of a child, the court found no standing for a co-parent of a child born during cohabitation of the lesbian partners at a time when same-sex marriage was not possible in Michigan. Sheardown, who is neither biologically nor adoptively related to the child, contended that Michigan's Child Custody Act's (CCA) definition of a parent—the natural or adoptive parent of a child—is an unconstitutional violation of her fundamental right to parent. The Michigan Court of Appeals affirmed dismissal lack of standing., reasoning that the definition did not run afoul of Obergefell because it applies equally to same-sex and opposite-sex unmarried couples).

Strickland v. Day, 239 So. 3d 486 (Miss. Apr. 5, 2018) (Recognized a former same-sex spouse as a parent of a child born during the parties' marriage – contracted out of state - on the ground of equitable estoppel. None of the five written opinions mentioned the common law doctrine of the parental presumption, which presumes that the spouse of a woman who gives birth to a child during marriage is the child's other parent, presumably to avoid having to deal with the question of retroactive application of Obergefell to find that Mississippi had to recognize the marriage).

Prisoner Rights

Block v. Pohling, 735 F. App'x 555 (11th Cir. May 8, 2018). (Rejected a damages case brought by a gay inmate after the defendant "branded" him as a target. CO Pohling called Block a "fruit, faggot, and a punk" loud enough for other inmates and staff to hear, then double-celled Block with a known violent sex offender, Hippolyte, who raped Block numerous times. The court held that Block presented no proof of causation. The court did not mention Pohling's decision to place Hippolyte in Block's cell as a possible source of causation. This case resurrects the defense rejected in Farmer v. Brennan: that a plaintiff had to prove direct causation from a creator of conditions to an assailant's action to succeed in a protection from harm case.)

Edmo v. Idaho Dep't of Correction, 2018 WL 6571203 (D. Idaho Dec. 13, 2018), appeal filed (9th Cir. Jan. 10, 2019) (finding that denial of gender confirmation surgery to incarcerated transgender person violated the Eighth Amendment and ordering Idaho Department of Correction to provide plaintiff with adequate medical care, including gender confirmation surgery)

De Veloz v. Miami-Dade County, 2018 U.S. App. LEXIS 32960, 2018 WL 6131780 (U.S. Ct. App., 11th Cir., Nov. 21, 2018) (Woman who was assigned to men's prison in mistaken belief that she was a transgender man has state a claim against prison officials for violation of her constitutional rights).

Gomez v. Bd. of Parole & Post-Prison Supervision, 362 Or. 662, 413 P.3d 974 (Mar. 22, 2018). (Declined petition to review parole denial of transgender prisoner convicted of murder. In concurrence, out gay Justice Rives Kistler reminded the board that it has an obligation to ensure that its determination of the risk an inmate poses to the community should not be based on the inmate's gender, gender identity, race, or sexual orientation).

Hicklin v. Precynthe, No. 4:16-CV-01357-NCC, 2018 WL 806764, at *15 (E.D. Mo. Feb. 9, 2018) (holding that enforcement of "freeze-frame" policy preventing hormone therapy and denial of social transitioning constituted deliberate indifference to incarcerated transgender person's serious medical needs, in violation of Eighth Amendment, and ordering Missouri Department of Corrections to provide medically necessary treatment for plaintiff's gender dysphoria, including hormone therapy, access to permanent body hair removal, and access to "gender-affirming" canteen items)

Keohane v. Jones, 328 F. Supp. 3d 1288 (N.D. Fla. 2018), appeal filed (11th Cir. Sept. 26, 2018) (holding that enforcement of "freeze-frame" policy preventing hormone therapy and denial of social transitioning constituted deliberate indifference to incarcerated transgender person's serious medical needs, in violation of Eighth Amendment)

Leonard v. Commonwealth of Virginia, 2018 WL 6566790, 2018 Va. LEXIS 184 (Va. Supreme Ct., Dec. 13, 2018) (Circuit court misapplied Virginia law and committed an abuse of discretion when it denied a name change to a transgender prison inmate; holding state's computerized prison records system would obviate problems that might arise from a legal name change for an inmate).

M.C., In re, 2018 Cal. App. Unpub. LEXIS 7913, 2018 WL 6167315 (Cal. Ct. App., 2nd Dist., Nov. 26, 2018) (affirms placement of transgender male prisoner in women's camp of California Youth Authority; placement was within discretion of trial judge, given the severity of the offense).

Medlock v. Freed, No. 17-2311, 2018 U.S. App. LEXIS 19463 (6th Cir. July 13, 2018) (upholding grant of summary judgment to corrections officers sued for deliberate indifference to danger to gay inmate due to enmity of prison gang; since officers took some action in response to inmate's request, court found that subjective component of liability test was not met).

Quine v. Kernan, 741 F. App'x 358 (9th Cir. June 28 2018). (Affirming district court's order that various items be made available to transgender inmate; holding that transgender status as to be determined by medical personnel, not self-declaration.)

Privacy Rights/Defamation

Hurley v. California Dep't of Parks & Recreation, 20 Cal. App. 5th 634, 229 Cal. Rptr. 3d 219 (Ct. App., 4th Dist. Feb. 21, 2018). (Affirmed jury verdict in favor of a lesbian former employee on finding that employer violated the Information Practices Act based on improper treatment of personnel file, and supervisor caused her emotional distress. Hurley's supervisor failed to keep Hurley's personnel file confidential).

Nolan v. State of N.Y., 158 A.D.3d 186 (N.Y. App. Div., 1st Dept. Jan 16. 2018)(Allowing woman pictured without her consent in advertisement for State Division of Human Rights' HIV discrimination campaign to seek damages for per se defamation. Rejecting State's argument that the "loathesome disease" category for per se defamation was archaic, so damage to reputation can be presumed. Specifically, the court stated that certain medical conditions like HIV unfortunately continue to subject those who have them to a degree of societal disapproval and shunning. The court's conclusion did not mean that the judges themselves regarded HIV as loathsome. Instead, the court suggested that the loathsome disease category applies to conditions that a significant segment of society has been too slow in understanding that those who have the disease are entitled to equal treatment under the law.) On remand to determine damages, Court of Claims ordered that the State pay Noaln $125,000. Nolan v. State of New York, 2018 N.Y. Misc. LEXIS 5887, 2018 N.Y. Slip Op 51789 (Ct. Claims, November 8, 2018).

Protest Rights

McGlone v. Metropolitan Government of Nashville & Davidson County, 2018 U.S. App. LEXIS 26635, 2018 WL 4502283 (U.S. Ct. App., 6th Cir., Sept. 19, 2018) (Police violated 1st Amendment rights of anti-LGBT protesters by excluding them from Public Square Park in Nashville during nearby LGBTQ Pride Festival; content based regulation of speech subject to strict scrutiny).

Public Accommodations Discrimination

Brush & Nib Studio, LC v. City of Phoenix, 244 Ariz. 59, 418 P.3d 426 (Ct. App. June 7, 2018), review granted (Nov. 20, 2018). (Affirmed a ruling by Maricopa County Superior Court rejecting the plaintiffs' claim that the Phoenix public accommodations law would violate their constitutional rights if it required them to provide goods and services for same-sex weddings.)

Cervelli v. Aloha Bed & Breakfast, 142 Haw. 177 (Ct. App. Feb. 23, 2018); petition for certiorari denied by Hawaii Supreme Court, 2018 WL 3358586 (July 10, 2018), petition for certiorari filed in U.S. Supreme Court, No. 18-451 (Oct. 11, 2018), pending. (Operator of an owner-occupied Bed & Breakfast violated the state's public accommodations law by refusing to rent a room to a lesbian couple who were seeking vacation accommodations.)

Cormier v. Pf Fitness-Midland, 909 N.W.2d 266 (Mich., Apr. 6, 2018); on remand, 2018 Mich. App. LEXIS 2938, 2018 WL 3594443 (Ct. App. July 26, 2018) (Court of Appeals unanimously affirmed a trial court order granting summary judgment to PF Fitness-Midland, LLC, which terminated Cormier's membership because of actions she took after learning of Planet Fitness's pro-transgender locker room policy. Then on April 6, 2018, Michigan Supreme Court vacated that part of the Court of Appeals judgment concluding that the plaintiff had abandoned her claims under the Michigan Consumer Protection Act. On July 26, Court of Appeals held that Cormier may have a viable claim under MCL 445.903(1), which is concerned with failure of sellers to disclose material facts in commercial transactions; on remand, the trial court must determine whether the defendant should have informed her of its gender self-identification policy when she applied for a gym membership.)

Department of Fair Employment and Housing v. Cathy's Creations, BCV-17-012855 (Kern County Super. Ct., Feb. 5, 2018), appeal filed in 5th Dist. Ct. App., July 16, 2018) (Superior Court Judge David Lampe became the first judge to rule in favor of a business that contended that it is entitled to a 1st Amendment exemption from complying with state law that bans sexual orientation discrimination by businesses in a wedding cake case.)

Klein v. Oregon Bureau of Labor & Industries, 289 Or. App. 507 (Or. Ct. App. Dec. 28, 2017), review denied, 363 Or. 224 (June 23, 2018), petition for certiorari docketed, No. 18-547. (upholding administrative determination that plaintiff violated public accommodations law by refusing to make wedding cake for same-sex couple).

Refugee Cases (Asylum, Withholding of Removal, Convention against Torture)

Matter of A- B-, 27 I. & N. Dec. 316, 2018 BIA LEXIS 24 (B.I.A. June 11, 2018). (Attorney General Jeff Sessions issued an opinion binding on Immigration Judges and the Board of Immigration Appeals, toughening the standards for granting asylum to persons seeing to live in the United States by claiming that they had to flee their home country because of persecution. Session's opinion, depending on how it is interpreted, may pose barriers to LGBTQ people, particularly minors, fleeing from actual or feared violence at the hands of their families and neighbors.)

Abass v. Sessions, 731 F. App'x 646 (9th Cir. Apr. 27, 2018). (Reversed the Board of Immigration Appeals' denial of asylum, withholding of removal, and relief under the Convention against Torture (CAT) to a gay man from Ghana who had been a victim of torture. Significantly,

the court found that there was enough evidence to show that Ghanaian officials acquiesce in the torture of LGBT people. Ghana criminalizes homosexual conduct, political leaders call for the lynching of LGBT people, and Abass provided two declarations stating that he would be killed upon returning to Ghana and that his lover had already been killed. The court also found that the record supports a finding that Ghana is rife with gross, flagrant, or mass violations of human rights.)

Autunez-Blanco v. Whitaker, 2018 WL 6505436, 2018 U.S. App. LEXIS 34696 (5th Cir., Dec. 10, 2018) (Applying new withholding restrictions on a petition from an HIV-positive gay man from Honduras, the court found that economic extortion and actions based on a criminal motive by gangs were not sufficient to rise to persecution on a prohibited ground, where it was not shown that petitioner's membership in a particular social group made him a target. Further, petitioner failed to show he would likely be subject to torture if returned to Honduras).

Bernard v. Sessions, 881 F.3d 1042 (7th Cir. Feb. 8, 2018). (Upheld the Board of Immigration Appeals' affirmance of an Immigration Judge's denial of withholding of removal and deferral under the Convention Against Torture (CAT) to a bisexual Jamaican man.)

Bogdan-Adrian v. Sessions, 717 F. App'x 747 (9th Cir. Apr. 5, 2018). (Denied a petition by a gay Romanian man to review the Board of Immigration Appeals' ruling to affirm an Immigration Judge's decision to deny his application for asylum, withholding of removal, and protection under the Convention against Torture. Holding that although social abuses against homosexuals still occur in Romania, petitioner had not met his burden of proving an individualized risk of future persecution or a pattern or practice of persecution against similarly situated persons.)

Chambers v. Sessions, 740 F. App'x 191 (2d Cir. June 27, 2018). (Denial of relief under the Convention Against Torture for a man from Jamaica who claimed he was bisexual. The IJ's adverse credibility determination was partly based on Chambers' failure to prove that he is bisexual by producing any evidence from or about same-sex partners.)

Gutierrez-Bulux v. Sessions, 740 F. App'x 863 (9th Cir. July 2, 2018). (Denied petition of HIV-positive man from Guatemala—who also claimed to be gay— for asylum, withholding of removal, or protection under the Convention against Torture. Petition for asylum untimely; credibility issues due to petitioner's varying narrative supported BIA's denial of withholding relief; record did not compel a finding that AIDS sufferers were a persecuted social group in Guatemala, or that it was more probable than not that the Guatemalan government might acquiesce in the torture of someone who has contracted HIV).

Martinez-Almendares v. Attorney General of United States, 724 F. App'x 168 (3d Cir. May 2, 2018). (Rejected pro se challenge by gay man from Honduras to the Board of Immigration Appeals' adoption of an Immigration Judge ruling denying his petition for asylum, withholding of removal, or protection under the Convention Against Torture. The court agreed with the BIA that the petitioner failed to show that the violent gangs in Honduras would necessarily know that the petitioner was gay).

Medina v. Sessions, 734 F. App'x 479 (9th Cir., May 16, 2018). (Reiterating 9th Circuit's view that Board of Immigration appeals must distinguish between sexual orientation and gender identity in determining whether a refugee is entitled to withholding of removal or protection

under the Convention Against Torture. The 9th Circuit has found that transgender people are at high risk for persecution or worse in Mexico, despite political and social gains made by the gay community there in recent years).

Molina Mendoza v. Sessions, 712 F. App'x 240 (4th Cir. Jan. 18, 2018) (Remanding petition of a gay Mexican seeking asylum, for failure by Board of Immigration Appeals to explain its decision in terms that would permit effective judicial review. Petitioner proffered documentary evidence to the Immigration Judge that discrimination and violence against Mexico's LGBTQ community is widespread. However, the IJ denied his application after finding that Mendoza failed to establish that LGBTQ individuals in Mexico face a pattern of harm severe enough to constitute persecution. The BIA adopted the IJ decision without any new factual determinations or explanations. The 4th Circuit noted that the record contained significant evidence that undermined the IJ's original determination.)

Munoz v. Sessions, 733 F. App'x 904 (9th Cir. Aug. 10, 2018) (While agreeing that asylum petition based on HIV status was time-barred, court remanded bisexual man from El Salvador's case to BIA for consideration of withholding of removal or protection under Convention against Torture, based on history of sexual abuse by family members and a neighbor; questionable that petitioner can succeed in light of Sessions decision removing domestic violence claims as basis for refugee protection, although Sessions decision is being subjected to judicial challenge).

Nwadinobi v. Sessions, 733 F. App'x 889 (9th Cir. Apr. 27, 2018). (A divided panel of the 9th Circuit ruled that an Immigration Judge's adverse credibility determination against a gay man from Nigeria seeking asylum was not supported by substantial evidence, and remanded the case for reconsideration).

Ogbemudia v. Sessions, 724 F. App'x 332 (5th Cir. 2018). (denying review of BIA's decision rejecting a gay Nigerian's claim for protection under the Convention Against Torture. The pro se petitioner sought relief for four reasons: (1) he had been tortured by state actors or with the acquiescence of state actors due to his homosexuality; (2) Nigeria criminalized homosexuality; (3) a friend had been killed in Nigeria because he was gay; and (4) his criminal history was not relevant to a CAT claim. The court found that the petitioner failed to show that, under the totality of the circumstances, the evidence is so compelling that no reasonable fact-finder could make an adverse credibility determination, concluded that his claim was not adequately corroborated, or decide that he was ineligible for relief under the CAT. Yet, Petitioner asserted before the court that corroborating documents were confiscated during his transfer to the immigration detention center, the asylum officer failed to write down his statement during his "reasonable fear" interview, and other legal materials relevant to his case were confiscated.)

Ramos v. Sessions, 706 F. App'x 400 (9th Cir. Dec. 14, 2017). (Rejected Convention against Torture petition by a gay Mexican man facing removal proceedings after being convicted on a felony drug offense. Although reports of conditions in Mexico suggest that gay individuals continue to suffer discrimination and the petitioner's history of childhood abuse in rural Mexico is serious, he had not established that he was more likely than not to suffer torture if removed to Mexico.)

Sandoval-Nunez v. Sessions, 727 F. App'x 383 (9th Cir. 2018). (Denying Mexican lesbian's petition for review seeking protection under the Convention against Torture. BIA and IJ failed to

consider evidence that she would be tortured due to her sexual orientation or by individuals who abused her as a child or the Sinaloa cartel. The court found that even if her testimony was truthful, she had not shown she was more likely than not to be tortured at the acquiescence of a public official or other person acting in an official capacity. The panel adopted Attorney General Sessions' ruling that it is fine to send noncitizens back to countries where they are likely to be tortured or killed by family members, other civilians, or criminal gangs, since the CAT was intended to protect against state-sanctioned torture.)

Tairou v. Whitaker, 2018 WL 6252780, 2018 U.S. App. LEXIS 33621 (4th Cir., Nov. 30, 2018) (remanding bisexual man from Benin's claim for asylum, withholding of removal, or protection under the Convention Against Torture to the BIA, finding that his evidence of past persecution was sufficient to support presumption in his favor, contrary to the BIA's ruling; a death threat is serious enough to support petitioner's reasonable fear of persecution).

Thompson v. Whitaker, 2018 WL 6641279 (U.S. Ct. App., 2nd Cir., Dec. 18, 2018) (Lesbian from Domenica with a criminal record that precluded withholding of removal failed to establish a valid claim under the Convention Against Torture, the court finding that although homosexual conduct was against the law in Domenica, State Department reports indicated that the law was rarely enforced by the government).

Toby v. Attorney General of United States, 731 F. App'x 140 (3d Cir. Apr. 19, 2018). (Dismissing in part and denying in part an appeal from the Board of Immigration Appeals' denial of an openly gay man's Convention Against Torture (CAT) claim stating he feared harm if returned to Trinidad and Tobago. Petitioner's criminal record precluded asylum or withholding of removal. The Immigration Judge found that while Trinidad and Tobago criminalizes same-sex consensual sex, the law was rarely enforced, and it was not more likely than not that Petitioner would be tortured by, or with the acquiescence of a government official. The 3rd Circuit panel held that it lacked jurisdiction to review Petitioner's challenge of the IJ's factual finding about Trinidad and Tobago's laws. A jurisdiction-stripping federal statute forbade review of factual questions in cases in which the petitioner has been convicted of an aggravated felony; the court may only review legal questions.)

Transgender Health Care (Includes Insurance Coverage Issues Under Private and Government Programs)

Boyden v. Conlin, 2018 WL 2191733, 2018 U.S. Dist. LEXIS 79753 (W.D. Wis. May 11, 2018) (Plaintiffs may rely on disparate impact theory under Title VII to challenge decision of board administering employee benefits for Wisconsin state employees to refuse to cover sex reassignment procedures. Acknowledged potential violation of Affordable Care Act as well.); 2018 WL 4473347, 2018 U.S. Dist. LEXIS 158491 (W.D. Wis. Sept. 18, 2018) (Wisconsin's refusal to cover sex reassignment procedures for transgender state employees violated Title VII and the Affordable Care Act's sex discrimination provision, granting summary judgment to plaintiffs).

Flack v. Wisconsin Department of Health Services, 2018 WL 3574875 (W.D. Wis., July 25, 2018) (Preliminary injunction requiring Wisconsin Medicare program to cover sex reassignment procedures).

MASTERPIECE CAKESHOP, LTD., ET AL., Petitioners,

v.

COLORADO CIVIL RIGHTS COMMISSION, ET AL.

No. 16-111.

[138 S. Ct. 1719]

Supreme Court of the United States.

Argued December 5, 2017.

Decided June 4, 2018.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF COLORADO.

Syllabus

Masterpiece Cakeshop, Ltd., is a Colorado bakery owned and operated by Jack Phillips, an expert baker and devout Christian. In 2012 he told a same-sex couple that he would not create a cake for their wedding celebration because of his religious opposition to same-sex marriages—marriages that Colorado did not then recognize—but that he would sell them other baked goods, e.g., birthday cakes. The couple filed a charge with the Colorado Civil Rights Commission (Commission) pursuant to the Colorado Anti-Discrimination Act (CADA), which prohibits, as relevant here, discrimination based on sexual orientation in a "place of business engaged in any sales to the public and any place offering services . . . to the public." Under CADA's administrative review system, the Colorado Civil Rights Division first found probable cause for a violation and referred the case to the Commission. The Commission then referred the case for a formal hearing before a state Administrative Law Judge (ALJ), who ruled in the couple's favor. In so doing, the ALJ rejected Phillips' First Amendment claims: that requiring him to create a cake for a same-sex wedding would violate his right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed and would violate his right to the free exercise of religion. Both the Commission and the Colorado Court of Appeals affirmed.

Held: The Commission's actions in this case violated the Free Exercise Clause. Pp. 9-18.

(a) The laws and the Constitution can, and in some instances must, protect gay persons and gay couples in the exercise of their civil rights, but religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. See Obergefell v. Hodges, 576 U. S. ___, ___. While it is unexceptional that Colorado law can protect gay persons in acquiring products and services on the same terms and conditions as are offered to other members of the public, the law must be applied in a manner that is neutral toward religion. To Phillips, his claim that using his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of his own creation, has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. His dilemma was understandable in 2012, which was before Colorado recognized the validity of gay

marriages performed in the State and before this Court issued United States v. Windsor, 570 U. S. 744, or Obergefell. Given the State's position at the time, there is some force to Phillips' argument that he was not unreasonable in deeming his decision lawful. State law at the time also afforded storekeepers some latitude to decline to create specific messages they considered offensive. Indeed, while the instant enforcement proceedings were pending, the State Civil Rights Division concluded in at least three cases that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. Phillips too was entitled to a neutral and respectful consideration of his claims in all the circumstances of the case. Pp. 9-12.

(b) That consideration was compromised, however, by the Commission's treatment of Phillips' case, which showed elements of a clear and impermissible hostility toward the sincere religious beliefs motivating his objection. As the record shows, some of the commissioners at the Commission's formal, public hearings endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, disparaged Phillips' faith as despicable and characterized it as merely rhetorical, and compared his invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. No commissioners objected to the comments. Nor were they mentioned in the later state-court ruling or disavowed in the briefs filed here. The comments thus cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case.

Another indication of hostility is the different treatment of Phillips' case and the cases of other bakers with objections to anti-gay messages who prevailed before the Commission. The Commission ruled against Phillips in part on the theory that any message on the requested wedding cake would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the cases involving requests for cakes depicting anti-gay marriage symbolism. The Division also considered that each bakery was willing to sell other products to the prospective customers, but the Commission found Phillips' willingness to do the same irrelevant. The State Court of Appeals' brief discussion of this disparity of treatment does not answer Phillips' concern that the State's practice was to disfavor the religious basis of his objection. Pp. 12-16.

(c) For these reasons, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint. The government, consistent with the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520. Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." Id., at 540. In view of these factors, the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of his religious beliefs. The Commission gave "every appearance," id., at 545, of adjudicating his religious objection based on a negative normative "evaluation of the particular

justification" for his objection and the religious grounds for it, id., at 537, but government has no role in expressing or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. The inference here is thus that Phillips' religious objection was not considered with the neutrality required by the Free Exercise Clause. The State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. But the official expressions of hostility to religion in some of the commissioners' comments were inconsistent with that requirement, and the Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. Pp. 16-18.

370 P. 3d 272, reversed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and BREYER, ALITO, KAGAN, and GORSUCH, JJ., joined. KAGAN, J., filed a concurring opinion, in which BREYER, J., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. THOMAS, J., filed an opinion concurring in part and concurring in the judgment, in which GORSUCH, J., joined. GINSBURG, J., filed a dissenting opinion, in which SOTOMAYOR, J., joined.

JUSTICE KENNEDY, delivered the opinion of the Court.

In 2012 a same-sex couple visited Masterpiece Cakeshop, a bakery in Colorado, to make inquiries about ordering a cake for their wedding reception. The shop's owner told the couple that he would not create a cake for their wedding because of his religious opposition to same-sex marriages—marriages the State of Colorado itself did not recognize at that time. The couple filed a charge with the Colorado Civil Rights Commission alleging discrimination on the basis of sexual orientation in violation of the Colorado Anti-Discrimination Act.

The Commission determined that the shop's actions violated the Act and ruled in the couple's favor. The Colorado state courts affirmed the ruling and its enforcement order, and this Court now must decide whether the Commission's order violated the Constitution.

The case presents difficult questions as to the proper reconciliation of at least two principles. The first is the authority of a State and its governmental entities to protect the rights and dignity of gay persons who are, or wish to be, married but who face discrimination when they seek goods or services. The second is the right of all persons to exercise fundamental freedoms under the First Amendment, as applied to the States through the Fourteenth Amendment.

The freedoms asserted here are both the freedom of speech and the free exercise of religion. The free speech aspect of this case is difficult, for few persons who have seen a beautiful wedding cake might have thought of its creation as an exercise of protected speech. This is an instructive example, however, of the proposition that the application of constitutional freedoms in new contexts can deepen our understanding of their meaning.

One of the difficulties in this case is that the parties disagree as to the extent of the baker's refusal to provide service. If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.

The same difficulties arise in determining whether a baker has a valid free exercise claim. A baker's refusal to attend the wedding to ensure that the cake is cut the right way, or a refusal to put certain religious words or decorations on the cake, or even a refusal to sell a cake that has been baked for the public generally but includes certain religious words or symbols on it are just three examples of possibilities that seem all but endless.

Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality. The reason and motive for the baker's refusal were based on his sincere religious beliefs and convictions. The Court's precedents make clear that the baker, in his capacity as the owner of a business serving the public, might have his right to the free exercise of religion limited by generally applicable laws. Still, the delicate question of when the free exercise of his religion must yield to an otherwise valid exercise of state power needed to be determined in an adjudication in which religious hostility on the part of the State itself would not be a factor in the balance the State sought to reach. That requirement, however, was not met here. When the Colorado Civil Rights Commission considered this case, it did not do so with the religious neutrality that the Constitution requires.

Given all these considerations, it is proper to hold that whatever the outcome of some future controversy involving facts similar to these, the Commission's actions here violated the Free Exercise Clause; and its order must be set aside.

I.

A

Masterpiece Cakeshop, Ltd., is a bakery in Lakewood, Colorado, a suburb of Denver. The shop offers a variety of baked goods, ranging from everyday cookies and brownies to elaborate custom-designed cakes for birthday parties, weddings, and other events.

Jack Phillips is an expert baker who has owned and operated the shop for 24 years. Phillips is a devout Christian. He has explained that his "main goal in life is to be obedient to" Jesus Christ and Christ's "teachings in all aspects of his life." App. 148. And he seeks to "honor God through his work at Masterpiece Cakeshop." Ibid. One of Phillips' religious beliefs is that "God's intention for marriage from the beginning of history is that it is and should be the union of one man and one woman." Id., at 149. To Phillips, creating a wedding cake for a same-sex wedding would be equivalent to participating in a celebration that is contrary to his own most deeply held beliefs.

Phillips met Charlie Craig and Dave Mullins when they entered his shop in the summer of 2012. Craig and Mullins were planning to marry. At that time, Colorado did not recognize same-sex marriages, so the couple planned to wed legally in Massachusetts and afterwards to host a reception for their family and friends in Denver. To prepare for their celebration, Craig and Mullins visited the shop and told Phillips that they were interested in ordering a cake for "our wedding." Id., at 152 (emphasis deleted). They did not mention the design of the cake they envisioned.

Phillips informed the couple that he does not "create" wedding cakes for same-sex weddings. Ibid. He explained, "I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings." Ibid. The couple left the shop without further discussion.

The following day, Craig's mother, who had accompanied the couple to the cakeshop and been present for their interaction with Phillips, telephoned to ask Phillips why he had declined to serve her son. Phillips explained that he does not create wedding cakes for same-sex weddings because of his religious opposition to same-sex marriage, and also because Colorado (at that time) did not recognize same-sex marriages. Id., at 153. He later explained his belief that "to create a wedding cake for an event that celebrates something that directly goes against the teachings of the Bible, would have been a personal endorsement and participation in the ceremony and relationship that they were entering into." Ibid. (emphasis deleted).

B

For most of its history, Colorado has prohibited discrimination in places of public accommodation. In 1885, less than a decade after Colorado achieved statehood, the General Assembly passed "An Act to Protect All Citizens in Their Civil Rights," which guaranteed "full and equal enjoyment" of certain public facilities to "all citizens," "regardless of race, color or previous condition of servitude." 1885 Colo. Sess. Laws pp. 132-133. A decade later, the General Assembly expanded the requirement to apply to "all other places of public accommodation." 1895 Colo. Sess. Laws ch. 61, p. 139.

Today, the Colorado Anti-Discrimination Act (CADA) carries forward the state's tradition of prohibiting discrimination in places of public accommodation. Amended in 2007 and 2008 to prohibit discrimination on the basis of sexual orientation as well as other protected characteristics, CADA in relevant part provides as follows:

"It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." Colo. Rev. Stat. §24-34-601(2)(a) (2017).

The Act defines "public accommodation" broadly to include any "place of business engaged in any sales to the public and any place offering services . . . to the public," but excludes "a church,

synagogue, mosque, or other place that is principally used for religious purposes." §24-34-601(1).

CADA establishes an administrative system for the resolution of discrimination claims. Complaints of discrimination in violation of CADA are addressed in the first instance by the Colorado Civil Rights Division. The Division investigates each claim; and if it finds probable cause that CADA has been violated, it will refer the matter to the Colorado Civil Rights Commission. The Commission, in turn, decides whether to initiate a formal hearing before a state Administrative Law Judge (ALJ), who will hear evidence and argument before issuing a written decision. See §§24-34-306, 24-4-105(14). The decision of the ALJ may be appealed to the full Commission, a seven-member appointed body. The Commission holds a public hearing and deliberative session before voting on the case. If the Commission determines that the evidence proves a CADA violation, it may impose remedial measures as provided by statute. See §24-34-306(9). Available remedies include, among other things, orders to cease-anddesist a discriminatory policy, to file regular compliance reports with the Commission, and "to take affirmative action, including the posting of notices setting forth the substantive rights of the public." §24-34-605. Colorado law does not permit the Commission to assess money damages or fines. §§24-34-306(9), 24-34-605.

C

Craig and Mullins filed a discrimination complaint against Masterpiece Cakeshop and Phillips in August 2012, shortly after the couple's visit to the shop. App. 31. The complaint alleged that Craig and Mullins had been denied "full and equal service" at the bakery because of their sexual orientation, id., at 35, 48, and that it was Phillips'"standard business practice" not to provide cakes for same-sex weddings, id., at 43.

The Civil Rights Division opened an investigation. The investigator found that "on multiple occasions," Phillips "turned away potential customers on the basis of their sexual orientation, stating that he could not create a cake for a same-sex wedding ceremony or reception" because his religious beliefs prohibited it and because the potential customers "were doing something illegal" at that time. Id., at 76. The investigation found that Phillips had declined to sell custom wedding cakes to about six other same-sex couples on this basis. Id., at 72. The investigator also recounted that, according to affidavits submitted by Craig and Mullins, Phillips' shop had refused to sell cupcakes to a lesbian couple for their commitment celebration because the shop "had a policy of not selling baked goods to same-sex couples for this type of event." Id., at 73. Based on these findings, the Division found probable cause that Phillips violated CADA and referred the case to the Civil Rights Commission. Id., at 69.

The Commission found it proper to conduct a formal hearing, and it sent the case to a State ALJ. Finding no dispute as to material facts, the ALJ entertained cross-motions for summary judgment and ruled in the couple's favor. The ALJ first rejected Phillips' argument that declining to make or create a wedding cake for Craig and Mullins did not violate Colorado law. It was undisputed that the shop is subject to state public accommodations laws. And the ALJ determined that

Phillips' actions constituted prohibited discrimination on the basis of sexual orientation, not simply opposition to same-sex marriage as Phillips contended. App. to Pet. for Cert. 68a-72a.

Phillips raised two constitutional claims before the ALJ. He first asserted that applying CADA in a way that would require him to create a cake for a same-sex wedding would violate his First Amendment right to free speech by compelling him to exercise his artistic talents to express a message with which he disagreed. The ALJ rejected the contention that preparing a wedding cake is a form of protected speech and did not agree that creating Craig and Mullins' cake would force Phillips to adhere to "an ideological point of view." Id., at 75a. Applying CADA to the facts at hand, in the ALJ's view, did not interfere with Phillips' freedom of speech.

Phillips also contended that requiring him to create cakes for same-sex weddings would violate his right to the free exercise of religion, also protected by the First Amendment. Citing this Court's precedent in Employment Div., Dept. of Human Resources of Ore. v. Smith, 494 U. S. 872 (1990), the ALJ determined that CADA is a "valid and neutral law of general applicability" and therefore that applying it to Phillips in this case did not violate the Free Exercise Clause. Id., at 879; App. to Pet. for Cert. 82a-83a. The ALJ thus ruled against Phillips and the cakeshop and in favor of Craig and Mullins on both constitutional claims.

The Commission affirmed the ALJ's decision in full. Id., at 57a. The Commission ordered Phillips to "cease and desist from discriminating against . . . same-sex couples by refusing to sell them wedding cakes or any product [they] would sell to heterosexual couples." Ibid. It also ordered additional remedial measures, including "comprehensive staff training on the Public Accommodations section" of CADA "and changes to any and all company policies to comply with . . . this Order." Id., at 58a. The Commission additionally required Phillips to prepare "quarterly compliance reports" for a period of two years documenting "the number of patrons denied service" and why, along with "a statement describing the remedial actions taken." Ibid.

Phillips appealed to the Colorado Court of Appeals, which affirmed the Commission's legal determinations and remedial order. The court rejected the argument that the "Commission's order unconstitutionally compels" Phillips and the shop "to convey a celebratory message about same sex marriage." Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 283 (2015). The court also rejected the argument that the Commission's order violated the Free Exercise Clause. Relying on this Court's precedent in Smith, supra, at 879, the court stated that the Free Exercise Clause "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability" on the ground that following the law would interfere with religious practice or belief. 370 P. 3d, at 289. The court concluded that requiring Phillips to comply with the statute did not violate his free exercise rights. The Colorado Supreme Court declined to hear the case.

Phillips sought review here, and this Court granted certiorari. 582 U. S. ___ (2017). He now renews his claims under the Free Speech and Free Exercise Clauses of the First Amendment.

II.

A

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in Obergefell v. Hodges, 576 U. S. ___ (2015), "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." Id., at ___ (slip op., at 27). Nevertheless, while those religious and philosophical objections are protected, it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law. See Newman v. Piggy Park Enterprises, Inc., 390 U. S. 400, 402, n. 5 (1968) (per curiam); see also Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557, 572 (1995) ("Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments").

When it comes to weddings, it can be assumed that a member of the clergy who objects to gay marriage on moral and religious grounds could not be compelled to perform the ceremony without denial of his or her right to the free exercise of religion. This refusal would be well understood in our constitutional order as an exercise of religion, an exercise that gay persons could recognize and accept without serious diminishment to their own dignity and worth. Yet if that exception were not confined, then a long list of persons who provide goods and services for marriages and weddings might refuse to do so for gay persons, thus resulting in a community-wide stigma inconsistent with the history and dynamics of civil rights laws that ensure equal access to goods, services, and public accommodations.

It is unexceptional that Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public. And there are no doubt innumerable goods and services that no one could argue implicate the First Amendment. Petitioners conceded, moreover, that if a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case under this Court's precedents that this would be a denial of goods and services that went beyond any protected rights of a baker who offers goods and services to the general public and is subject to a neutrally applied and generally applicable public accommodations law. See Tr. of Oral Arg. 4-7, 10.

Phillips claims, however, that a narrower issue is presented. He argues that he had to use his artistic skills to make an expressive statement, a wedding endorsement in his own voice and of

his own creation. As Phillips would see the case, this contention has a significant First Amendment speech component and implicates his deep and sincere religious beliefs. In this context the baker likely found it difficult to find a line where the customers' rights to goods and services became a demand for him to exercise the right of his own personal expression for their message, a message he could not express in a way consistent with his religious beliefs.

Phillips' dilemma was particularly understandable given the background of legal principles and administration of the law in Colorado at that time. His decision and his actions leading to the refusal of service all occurred in the year 2012. At that point, Colorado did not recognize the validity of gay marriages performed in its own State. See Colo. Const., Art. II, §31 (2012); 370 P. 3d, at 277. At the time of the events in question, this Court had not issued its decisions either in United States v. Windsor, 570 U. S. 744 (2013), or Obergefell. Since the State itself did not allow those marriages to be performed in Colorado, there is some force to the argument that the baker was not unreasonable in deeming it lawful to decline to take an action that he understood to be an expression of support for their validity when that expression was contrary to his sincerely held religious beliefs, at least insofar as his refusal was limited to refusing to create and express a message in support of gay marriage, even one planned to take place in another State.

At the time, state law also afforded storekeepers some latitude to decline to create specific messages the storekeeper considered offensive. Indeed, while enforcement proceedings against Phillips were ongoing, the Colorado Civil Rights Division itself endorsed this proposition in cases involving other bakers' creation of cakes, concluding on at least three occasions that a baker acted lawfully in declining to create cakes with decorations that demeaned gay persons or gay marriages. See Jack v. Gateaux, Ltd., Charge No. P20140071X (Mar. 24, 2015); Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X (Mar. 24, 2015); Jack v. Azucar Bakery, Charge No. P20140069X (Mar. 24, 2015).

There were, to be sure, responses to these arguments that the State could make when it contended for a different result in seeking the enforcement of its generally applicable state regulations of businesses that serve the public. And any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying "no goods or services will be sold if they will be used for gay marriages," something that would impose a serious stigma on gay persons. But, nonetheless, Phillips was entitled to the neutral and respectful consideration of his claims in all the circumstances of the case.

B

The neutral and respectful consideration to which Phillips was entitled was compromised here, however. The Civil Rights Commission's treatment of his case has some elements of a clear and impermissible hostility toward the sincere religious beliefs that motivated his objection.

That hostility surfaced at the Commission's formal, public hearings, as shown by the record. On May 30, 2014, the seven-member Commission convened publicly to consider Phillips' case. At

several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community. One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." Tr. 23. A few moments later, the commissioner restated the same position: "[I]f a businessman wants to do business in the state and he's got an issue with the— the law's impacting his personal belief system, he needs to look at being able to compromise." Id., at 30. Standing alone, these statements are susceptible of different interpretations. On the one hand, they might mean simply that a business cannot refuse to provide services based on sexual orientation, regardless of the proprietor's personal views. On the other hand, they might be seen as inappropriate and dismissive comments showing lack of due consideration for Phillips' free exercise rights and the dilemma he faced. In view of the comments that followed, the latter seems the more likely.

On July 25, 2014, the Commission met again. This meeting, too, was conducted in public and on the record. On this occasion another commissioner made specific reference to the previous meeting's discussion but said far more to disparage Phillips' beliefs. The commissioner stated:

"I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt others." Tr. 11-12.

To describe a man's faith as "one of the most despicable pieces of rhetoric that people can use" is to disparage his religion in at least two distinct ways: by describing it as despicable, and also by characterizing it as merely rhetorical —something insubstantial and even insincere. The commissioner even went so far as to compare Phillips' invocation of his sincerely held religious beliefs to defenses of slavery and the Holocaust. This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's antidiscrimination law—a law that protects discrimination on the basis of religion as well as sexual orientation.

The record shows no objection to these comments from other commissioners. And the later state-court ruling reviewing the Commission's decision did not mention those comments, much less express concern with their content. Nor were the comments by the commissioners disavowed in the briefs filed in this Court. For these reasons, the Court cannot avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of Phillips' case. Members of the Court have disagreed on the question whether statements made by lawmakers may properly be taken into account in determining whether a law intentionally discriminates on the basis of religion. See Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 540-542 (1993); id., at 558 (Scalia, J., concurring in part and concurring in judgment). In this case, however, the remarks were made in a very different context—by an adjudicatory body deciding a particular case.

Another indication of hostility is the difference in treatment between Phillips' case and the cases of other bakers who objected to a requested cake on the basis of conscience and prevailed before the Commission.

As noted above, on at least three other occasions the Civil Rights Division considered the refusal of bakers to create cakes with images that conveyed disapproval of same-sex marriage, along with religious text. Each time, the Division found that the baker acted lawfully in refusing service. It made these determinations because, in the words of the Division, the requested cake included "wording and images [the baker] deemed derogatory," Jack v. Gateaux, Ltd., Charge No. P20140071X, at 4; featured "language and images [the baker] deemed hateful," Jack v. Le Bakery Sensual, Inc., Charge No. P20140070X, at 4; or displayed a message the baker "deemed as discriminatory, Jack v. Azucar Bakery, Charge No. P20140069X, at 4.

The treatment of the conscience-based objections at issue in these three cases contrasts with the Commission's treatment of Phillips' objection. The Commission ruled against Phillips in part on the theory that any message the requested wedding cake would carry would be attributed to the customer, not to the baker. Yet the Division did not address this point in any of the other cases with respect to the cakes depicting anti-gay marriage symbolism. Additionally, the Division found no violation of CADA in the other cases in part because each bakery was willing to sell other products, including those depicting Christian themes, to the prospective customers. But the Commission dismissed Phillips' willingness to sell "birthday cakes, shower cakes, [and] cookies and brownies," App. 152, to gay and lesbian customers as irrelevant. The treatment of the other cases and Phillips' case could reasonably be interpreted as being inconsistent as to the question of whether speech is involved, quite apart from whether the cases should ultimately be distinguished. In short, the Commission's consideration of Phillips' religious objection did not accord with its treatment of these other objections.

Before the Colorado Court of Appeals, Phillips protested that this disparity in treatment reflected hostility on the part of the Commission toward his beliefs. He argued that the Commission had treated the other bakers' conscience-based objections as legitimate, but treated his as illegitimate—thus sitting in judgment of his religious beliefs themselves. The Court of Appeals addressed the disparity only in passing and relegated its complete analysis of the issue to a footnote. There, the court stated that "[t]his case is distinguishable from the Colorado Civil Rights Division's recent findings that [the other bakeries] in Denver did not discriminate against a Christian patron on the basis of his creed" when they refused to create the requested cakes. 370 P. 3d, at 282, n. 8. In those cases, the court continued, there was no impermissible discrimination because "the Division found that the bakeries . . . refuse[d] the patron's request . . . because of the offensive nature of the requested message." Ibid.

A principled rationale for the difference in treatment of these two instances cannot be based on the government's own assessment of offensiveness. Just as "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 642 (1943), it is not, as the Court has repeatedly held, the role of the State or its officials to prescribe what shall be offensive. See Matal v. Tam, 582 U. S. ___, ___-___ (2017) (opinion of ALITO, J.) (slip op., at 22-23). The

Colorado court's attempt to account for the difference in treatment elevates one view of what is offensive over another and itself sends a signal of official disapproval of Phillips' religious beliefs. The court's footnote does not, therefore, answer the baker's concern that the State's practice was to disfavor the religious basis of his objection.

C

For the reasons just described, the Commission's treatment of Phillips' case violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint.

In Church of Lukumi Babalu Aye, supra, the Court made clear that the government, if it is to respect the Constitution's guarantee of free exercise, cannot impose regulations that are hostile to the religious beliefs of affected citizens and cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices. The Free Exercise Clause bars even "subtle departures from neutrality" on matters of religion. Id., at 534. Here, that means the Commission was obliged under the Free Exercise Clause to proceed in a manner neutral toward and tolerant of Phillips' religious beliefs. The Constitution "commits government itself to religious tolerance, and upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the Constitution and to the rights it secures." Id., at 547.

Factors relevant to the assessment of governmental neutrality include "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body." Id., at 540. In view of these factors the record here demonstrates that the Commission's consideration of Phillips' case was neither tolerant nor respectful of Phillips' religious beliefs. The Commission gave "every appearance," id., at 545, of adjudicating Phillips' religious objection based on a negative normative "evaluation of the particular justification" for his objection and the religious grounds for it. Id., at 537. It hardly requires restating that government has no role in deciding or even suggesting whether the religious ground for Phillips' conscience-based objection is legitimate or illegitimate. On these facts, the Court must draw the inference that Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires.

While the issues here are difficult to resolve, it must be concluded that the State's interest could have been weighed against Phillips' sincere religious objections in a way consistent with the requisite religious neutrality that must be strictly observed. The official expressions of hostility to religion in some of the commissioners' comments—comments that were not disavowed at the Commission or by the State at any point in the proceedings that led to affirmance of the order—were inconsistent with what the Free Exercise Clause requires. The Commission's disparate consideration of Phillips' case compared to the cases of the other bakers suggests the same. For these reasons, the order must be set aside.

III

The Commission's hostility was inconsistent with the First Amendment's guarantee that our laws be applied in a manner that is neutral toward religion. Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided. In this case the adjudication concerned a context that may well be different going forward in the respects noted above. However later cases raising these or similar concerns are resolved in the future, for these reasons the rulings of the Commission and of the state court that enforced the Commission's order must be invalidated.

The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market.

The judgment of the Colorado Court of Appeals is reversed.

It is so ordered.

JUSTICE KAGAN, with whom JUSTICE BREYER joins, concurring.

"[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Ante, at 9. But in upholding that principle, state actors cannot show hostility to religious views; rather, they must give those views "neutral and respectful consideration." Ante, at 12. I join the Court's opinion in full because I believe the Colorado Civil Rights Commission did not satisfy that obligation. I write separately to elaborate on one of the bases for the Court's holding.

The Court partly relies on the "disparate consideration of Phillips' case compared to the cases of [three] other bakers" who "objected to a requested cake on the basis of conscience." Ante, at 14, 18. In the latter cases, a customer named William Jack sought "cakes with images that conveyed disapproval of same-sex marriage, along with religious text"; the bakers whom he approached refused to make them. Ante, at 15; see post, at 3 (GINSBURG, J., dissenting) (further describing the requested cakes). Those bakers prevailed before the Colorado Civil Rights Division and Commission, while Phillips—who objected for religious reasons to baking a wedding cake for a same-sex couple—did not. The Court finds that the legal reasoning of the state agencies differed in significant ways as between the Jack cases and the Phillips case. See ante, at 15. And the Court takes especial note of the suggestion made by the Colorado Court of Appeals, in comparing those cases, that the state agencies found the message Jack requested "offensive [in] nature." Ante, at 16 (internal quotation marks omitted). As the Court states, a "principled rationale for the difference in treatment" cannot be "based on the government's own assessment of offensiveness." Ibid.

What makes the state agencies' consideration yet more disquieting is that a proper basis for distinguishing the cases was available—in fact, was obvious. The Colorado Anti-Discrimination Act (CADA) makes it unlawful for a place of public accommodation to deny "the full and equal enjoyment" of goods and services to individuals based on certain characteristics, including sexual orientation and creed. Colo. Rev. Stat. §24-34-601(2)(a) (2017). The three bakers in the Jack cases did not violate that law. Jack requested them to make a cake (one denigrating gay people and same-sex marriage) that they would not have made for any customer. In refusing that request, the bakers did not single out Jack because of his religion, but instead treated him in the same way they would have treated anyone else—just as CADA requires. By contrast, the same-sex couple in this case requested a wedding cake that Phillips would have made for an opposite-sex couple. In refusing that request, Phillips contravened CADA's demand that customers receive "the full and equal enjoyment" of public accommodations irrespective of their sexual orientation. Ibid. The different outcomes in the Jack cases and the Phillips case could thus have been justified by a plain reading and neutral application of Colorado law—untainted by any bias against a religious belief.[*]

I read the Court's opinion as fully consistent with that view. The Court limits its analysis to the reasoning of the state agencies (and Court of Appeals)—"quite apart from whether the [Phillips and Jack] cases should ultimately be distinguished." Ante, at 15. And the Court itself recognizes the principle that would properly account for a difference in result between those cases. Colorado law, the Court says, "can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." Ante, at 10. For that reason, Colorado can treat a baker who discriminates based on sexual orientation differently from a baker who does not discriminate on that or any other prohibited ground. But only, as the Court rightly says, if the State's decisions are not infected by religious hostility or bias. I accordingly concur.

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

In Employment Div., Dept. of Human Resources of Ore. v. Smith, this Court held that a neutral and generally applicable law will usually survive a constitutional free exercise challenge. 494 U. S. 872, 878-879 (1990). Smith remains controversial in many quarters. Compare McConnell, The Origins and Historical Understanding of Free Exercise of Religion, 103 Harv. L. Rev. 1409 (1990), with Hamburger, A Constitutional Right of Religious Exemption: An Historical Perspective, 60 Geo. Wash. L. Rev. 915 (1992). But we know this with certainty: when the government fails to act neutrally toward the free exercise of religion, it tends to run into trouble. Then the government can prevail only if it satisfies strict scrutiny, showing that its restrictions on religion both serve a compelling interest and are narrowly tailored. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520, 546 (1993).

Today's decision respects these principles. As the Court explains, the Colorado Civil Rights Commission failed to act neutrally toward Jack Phillips's religious faith. Maybe most notably, the Commission allowed three other bakers to refuse a customer's request that would have

required them to violate their secular commitments. Yet it denied the same accommodation to Mr. Phillips when he refused a customer's request that would have required him to violate his religious beliefs. Ante, at 14-16. As the Court also explains, the only reason the Commission seemed to supply for its discrimination was that it found Mr. Phillips's religious beliefs "offensive." Ibid. That kind of judgmental dismissal of a sincerely held religious belief is, of course, antithetical to the First Amendment and cannot begin to satisfy strict scrutiny. The Constitution protects not just popular religious exercises from the condemnation of civil authorities. It protects them all. Because the Court documents each of these points carefully and thoroughly, I am pleased to join its opinion in full.

The only wrinkle is this. In the face of so much evidence suggesting hostility toward Mr. Phillips's sincerely held religious beliefs, two of our colleagues have written separately to suggest that the Commission acted neutrally toward his faith when it treated him differently from the other bakers—or that it could have easily done so consistent with the First Amendment. See post, at 4-5, and n. 4 (GINSBURG, J., dissenting); ante, at 2-3, and n. (KAGAN, J., concurring). But, respectfully, I do not see how we might rescue the Commission from its error.

A full view of the facts helps point the way to the problem. Start with William Jack's case. He approached three bakers and asked them to prepare cakes with messages disapproving same-sex marriage on religious grounds. App. 233, 243, 252. All three bakers refused Mr. Jack's request, stating that they found his request offensive to their secular convictions. Id., at 231, 241, 250. Mr. Jack responded by filing complaints with the Colorado Civil Rights Division. Id., at 230, 240, 249. He pointed to Colorado's Anti-Discrimination Act, which prohibits discrimination against customers in public accommodations because of religious creed, sexual orientation, or certain other traits. See ibid.; Colo. Rev. Stat. §24-34-601(2)(a) (2017). Mr. Jack argued that the cakes he sought reflected his religious beliefs and that the bakers could not refuse to make them just because they happened to disagree with his beliefs. App. 231, 241, 250. But the Division declined to find a violation, reasoning that the bakers didn't deny Mr. Jack service because of his religious faith but because the cakes he sought were offensive to their own moral convictions. Id., at 237, 247, 255-256. As proof, the Division pointed to the fact that the bakers said they treated Mr. Jack as they would have anyone who requested a cake with similar messages, regardless of their religion. Id., at 230-231, 240, 249. The Division pointed, as well, to the fact that the bakers said they were happy to provide religious persons with other cakes expressing other ideas. Id., at 237, 247, 257. Mr. Jack appealed to the Colorado Civil Rights Commission, but the Commission summarily denied relief. App. to Pet. for Cert. 326a-331a.

Next, take the undisputed facts of Mr. Phillips's case. Charlie Craig and Dave Mullins approached Mr. Phillips about creating a cake to celebrate their wedding. App. 168. Mr. Phillips explained that he could not prepare a cake celebrating a same-sex wedding consistent with his religious faith. Id., at 168-169. But Mr. Phillips offered to make other baked goods for the couple, including cakes celebrating other occasions. Ibid. Later, Mr. Phillips testified without contradiction that he would have refused to create a cake celebrating a same-sex marriage for any customer, regardless of his or her sexual orientation. Id., at 166-167 ("I will not design and create wedding cakes for a same-sex wedding regardless of the sexual orientation of the

customer"). And the record reveals that Mr. Phillips apparently refused just such a request from Mr. Craig's mother. Id., at 38-40, 169. (Any suggestion that Mr. Phillips was willing to make a cake celebrating a same-sex marriage for a heterosexual customer or was not willing to sell other products to a homosexual customer, then, would simply mistake the undisputed factual record. See post, at 4, n. 2 (GINSBURG, J., dissenting); ante, at 2-3, and n. (KAGAN, J., concurring)). Nonetheless, the Commission held that Mr. Phillips's conduct violated the Colorado public accommodations law. App. to Pet. for Cert. 56a-58a.

The facts show that the two cases share all legally salient features. In both cases, the effect on the customer was the same: bakers refused service to persons who bore a statutorily protected trait (religious faith or sexual orientation). But in both cases the bakers refused service intending only to honor a personal conviction. To be sure, the bakers knew their conduct promised the effect of leaving a customer in a protected class unserved. But there's no indication the bakers actually intended to refuse service because of a customer's protected characteristic. We know this because all of the bakers explained without contradiction that they would not sell the requested cakes to anyone, while they would sell other cakes to members of the protected class (as well as to anyone else). So, for example, the bakers in the first case would have refused to sell a cake denigrating same-sex marriage to an atheist customer, just as the baker in the second case would have refused to sell a cake celebrating same-sex marriage to a heterosexual customer. And the bakers in the first case were generally happy to sell to persons of faith, just as the baker in the second case was generally happy to sell to gay persons. In both cases, it was the kind of cake, not the kind of customer, that mattered to the bakers.

The distinction between intended and knowingly accepted effects is familiar in life and law. Often the purposeful pursuit of worthy commitments requires us to accept unwanted but entirely foreseeable side effects: so, for example, choosing to spend time with family means the foreseeable loss of time for charitable work, just as opting for more time in the office means knowingly forgoing time at home with loved ones. The law, too, sometimes distinguishes between intended and foreseeable effects. See, e.g., ALI, Model Penal Code §§1.13, 2.02(2)(a)(i) (1985); 1 W. LaFave, Substantive Criminal Law §5.2(b), pp. 460-463 (3d ed. 2018). Other times, of course, the law proceeds differently, either conflating intent and knowledge or presuming intent as a matter of law from a showing of knowledge. See, e.g., Restatement (Second) of Torts §8A (1965); Radio Officers v. NLRB, 347 U. S. 17, 45 (1954).

The problem here is that the Commission failed to act neutrally by applying a consistent legal rule. In Mr. Jack's case, the Commission chose to distinguish carefully between intended and knowingly accepted effects. Even though the bakers knowingly denied service to someone in a protected class, the Commission found no violation because the bakers only intended to distance themselves from "the offensive nature of the requested message." Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 282, n. 8 (Colo. App. 2015); App. 237, 247, 256; App. to Pet. for Cert. 326a-331a; see also Brief for Respondent Colorado Civil Rights Commission 52 ("Businesses are entitled to reject orders for any number of reasons, including because they deem a particular product requested by a customer to be `offensive'"). Yet, in Mr. Phillips's case, the Commission dismissed this very same argument as resting on a "distinction without a

difference." App. to Pet. for Cert. 69a. It concluded instead that an "intent to disfavor" a protected class of persons should be "readily . . . presumed" from the knowing failure to serve someone who belongs to that class. Id., at 70a. In its judgment, Mr. Phillips's intentions were "inextricably tied to the sexual orientation of the parties involved" and essentially "irrational." Ibid.

Nothing in the Commission's opinions suggests any neutral principle to reconcile these holdings. If Mr. Phillips's objection is "inextricably tied" to a protected class, then the bakers' objection in Mr. Jack's case must be "inextricably tied" to one as well. For just as cakes celebrating same-sex weddings are (usually) requested by persons of a particular sexual orientation, so too are cakes expressing religious opposition to same-sex weddings (usually) requested by persons of particular religious faiths. In both cases the bakers' objection would (usually) result in turning down customers who bear a protected characteristic. In the end, the Commission's decisions simply reduce to this: it presumed that Mr. Phillip harbored an intent to discriminate against a protected class in light of the foreseeable effects of his conduct, but it declined to presume the same intent in Mr. Jack's case even though the effects of the bakers' conduct were just as foreseeable. Underscoring the double standard, a state appellate court said that "no such showing" of actual "animus"—or intent to discriminate against persons in a protected class—was even required in Mr. Phillips's case. 370 P. 3d, at 282.

The Commission cannot have it both ways. The Commission cannot slide up and down the mens rea scale, picking a mental state standard to suit its tastes depending on its sympathies. Either actual proof of intent to discriminate on the basis of membership in a protected class is required (as the Commission held in Mr. Jack's case), or it is sufficient to "presume" such intent from the knowing failure to serve someone in a protected class (as the Commission held in Mr. Phillips's case). Perhaps the Commission could have chosen either course as an initial matter. But the one thing it can't do is apply a more generous legal test to secular objections than religious ones. See Church of Lukumi Babalu Aye, 508 U. S., at 543-544. That is anything but the neutral treatment of religion.

The real explanation for the Commission's discrimination soon comes clear, too—and it does anything but help its cause. This isn't a case where the Commission self-consciously announced a change in its legal rule in all public accommodation cases. Nor is this a case where the Commission offered some persuasive reason for its discrimination that might survive strict scrutiny. Instead, as the Court explains, it appears the Commission wished to condemn Mr. Phillips for expressing just the kind of "irrational" or "offensive . . . message" that the bakers in the first case refused to endorse. Ante, at 16. Many may agree with the Commission and consider Mr. Phillips's religious beliefs irrational or offensive. Some may believe he misinterprets the teachings of his faith. And, to be sure, this Court has held same-sex marriage a matter of constitutional right and various States have enacted laws that preclude discrimination on the basis of sexual orientation. But it is also true that no bureaucratic judgment condemning a sincerely held religious belief as "irrational" or "offensive" will ever survive strict scrutiny under the First Amendment. In this country, the place of secular officials isn't to sit in judgment of religious beliefs, but only to protect their free exercise. Just as it is the "proudest boast of our free

speech jurisprudence" that we protect speech that we hate, it must be the proudest boast of our free exercise jurisprudence that we protect religious beliefs that we find offensive. See Matal v. Tam, 582 U. S. ___, ___ (2017) (plurality opinion) (slip op., at 25) (citing United States v. Schwimmer, 279 U. S. 644, 655 (1929) (Holmes, J., dissenting)). Popular religious views are easy enough to defend. It is in protecting unpopular religious beliefs that we prove this country's commitment to serving as a refuge for religious freedom. See Church of Lukumi Babalu Aye, supra, at 547; Thomas v. Review Bd. of Indiana Employment Security Div., 450 U. S. 707, 715-716 (1981); Wisconsin v. Yoder, 406 U. S. 205, 223-224 (1972); Cantwell v. Connecticut, 310 U. S. 296, 308-310 (1940).

Nor can any amount of after-the-fact maneuvering by our colleagues save the Commission. It is no answer, for example, to observe that Mr. Jack requested a cake with text on it while Mr. Craig and Mr. Mullins sought a cake celebrating their wedding without discussing its decoration, and then suggest this distinction makes all the difference. See post, at 4-5, and n. 4 (GINSBURG, J., dissenting). It is no answer either simply to slide up a level of generality to redescribe Mr. Phillips's case as involving only a wedding cake like any other, so the fact that Mr. Phillips would make one for some means he must make them for all. See ante, at 2-3, and n. (KAGAN, J., concurring). These arguments, too, fail to afford Mr. Phillips's faith neutral respect.

Take the first suggestion first. To suggest that cakes with words convey a message but cakes without words do not—all in order to excuse the bakers in Mr. Jack's case while penalizing Mr. Phillips—is irrational. Not even the Commission or court of appeals purported to rely on that distinction. Imagine Mr. Jack asked only for a cake with a symbolic expression against same-sex marriage rather than a cake bearing words conveying the same idea. Surely the Commission would have approved the bakers' intentional wish to avoid participating in that message too. Nor can anyone reasonably doubt that a wedding cake without words conveys a message. Words or not and whatever the exact design, it celebrates a wedding, and if the wedding cake is made for a same-sex couple it celebrates a same-sex wedding. See 370 P. 3d, at 276 (stating that Mr. Craig and Mr. Mullins "requested that Phillips design and create a cake to celebrate their same-sex wedding") (emphasis added). Like "an emblem or flag," a cake for a same-sex wedding is a symbol that serves as "a short cut from mind to mind," signifying approval of a specific "system, idea, [or] institution." West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 632 (1943). It is precisely that approval that Mr. Phillips intended to withhold in keeping with his religious faith. The Commission denied Mr. Phillips that choice, even as it afforded the bakers in Mr. Jack's case the choice to refuse to advance a message they deemed offensive to their secular commitments. That is not neutral.

Nor would it be proper for this or any court to suggest that a person must be forced to write words rather than create a symbol before his religious faith is implicated. Civil authorities, whether "high or petty," bear no license to declare what is or should be "orthodox" when it comes to religious beliefs, id., at 642, or whether an adherent has "correctly perceived" the commands of his religion, Thomas, supra, at 716. Instead, it is our job to look beyond the formality of written words and afford legal protection to any sincere act of faith. See generally Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557, 569

(1995) ("[T]he Constitution looks beyond written or spoken words as mediums of expression," which are "not a condition of constitutional protection").

The second suggestion fares no better. Suggesting that this case is only about "wedding cakes"—and not a wedding cake celebrating a same-sex wedding—actually points up the problem. At its most general level, the cake at issue in Mr. Phillips's case was just a mixture of flour and eggs; at its most specific level, it was a cake celebrating the same-sex wedding of Mr. Craig and Mr. Mullins. We are told here, however, to apply a sort of Goldilocks rule: describing the cake by its ingredients is too general; understanding it as celebrating a same-sex wedding is too specific; but regarding it as a generic wedding cake is just right. The problem is, the Commission didn't play with the level of generality in Mr. Jack's case in this way. It didn't declare, for example, that because the cakes Mr. Jack requested were just cakes about weddings generally, and all such cakes were the same, the bakers had to produce them. Instead, the Commission accepted the bakers' view that the specific cakes Mr. Jack requested conveyed a message offensive to their convictions and allowed them to refuse service. Having done that there, it must do the same here.

Any other conclusion would invite civil authorities to gerrymander their inquiries based on the parties they prefer. Why calibrate the level of generality in Mr. Phillips's case at "wedding cakes" exactly—and not at, say, "cakes" more generally or "cakes that convey a message regarding same-sex marriage" more specifically? If "cakes" were the relevant level of generality, the Commission would have to order the bakers to make Mr. Jack's requested cakes just as it ordered Mr. Phillips to make the requested cake in his case. Conversely, if "cakes that convey a message regarding same-sex marriage" were the relevant level of generality, the Commission would have to respect Mr. Phillips's refusal to make the requested cake just as it respected the bakers' refusal to make the cakes Mr. Jack requested. In short, when the same level of generality is applied to both cases, it is no surprise that the bakers have to be treated the same. Only by adjusting the dials just right—fine-tuning the level of generality up or down for each case based solely on the identity of the parties and the substance of their views—can you engineer the Commission's outcome, handing a win to Mr. Jack's bakers but delivering a loss to Mr. Phillips. Such results-driven reasoning is improper. Neither the Commission nor this Court may apply a more specific level of generality in Mr. Jack's case (a cake that conveys a message regarding same-sex marriage) while applying a higher level of generality in Mr. Phillips's case (a cake that conveys no message regarding same-sex marriage). Of course, under Smith a vendor cannot escape a public accommodations law just because his religion frowns on it. But for any law to comply with the First Amendment and Smith, it must be applied in a manner that treats religion with neutral respect. That means the government must apply the same level of generality across cases—and that did not happen here.

There is another problem with sliding up the generality scale: it risks denying constitutional protection to religious beliefs that draw distinctions more specific than the government's preferred level of description. To some, all wedding cakes may appear indistinguishable. But to Mr. Phillips that is not the case—his faith teaches him otherwise. And his religious beliefs are entitled to no less respectful treatment than the bakers' secular beliefs in Mr. Jack's case. This Court has explained these same points "[r]epeatedly and in many different contexts" over many

years. Smith, 494 U. S. at 887. For example, in Thomas a faithful Jehovah's Witness and steel mill worker agreed to help manufacture sheet steel he knew might find its way into armaments, but he was unwilling to work on a fabrication line producing tank turrets. 450 U. S., at 711. Of course, the line Mr. Thomas drew wasn't the same many others would draw and it wasn't even the same line many other members of the same faith would draw. Even so, the Court didn't try to suggest that making steel is just making steel. Or that to offend his religion the steel needed to be of a particular kind or shape. Instead, it recognized that Mr. Thomas alone was entitled to define the nature of his religious commitments—and that those commitments, as defined by the faithful adherent, not a bureaucrat or judge, are entitled to protection under the First Amendment. Id., at 714-716; see also United States v. Lee, 455 U. S. 252, 254-255 (1982); Smith, supra, at 887 (collecting authorities). It is no more appropriate for the United States Supreme Court to tell Mr. Phillips that a wedding cake is just like any other—without regard to the religious significance his faith may attach to it—than it would be for the Court to suggest that for all persons sacramental bread is just bread or a kippah is just a cap.

Only one way forward now remains. Having failed to afford Mr. Phillips's religious objections neutral consideration and without any compelling reason for its failure, the Commission must afford him the same result it afforded the bakers in Mr. Jack's case. The Court recognizes this by reversing the judgment below and holding that the Commission's order "must be set aside." Ante, at 18. Maybe in some future rulemaking or case the Commission could adopt a new "knowing" standard for all refusals of service and offer neutral reasons for doing so. But, as the Court observes, "[h]owever later cases raising these or similar concerns are resolved in the future, . . . the rulings of the Commission and of the state court that enforced the Commission's order" in this case "must be invalidated." Ibid. Mr. Phillips has conclusively proven a First Amendment violation and, after almost six years facing unlawful civil charges, he is entitled to judgment.

JUSTICE THOMAS, with whom JUSTICE GORSUCH joins, concurring in part and concurring in the judgment.

I agree that the Colorado Civil Rights Commission (Commission) violated Jack Phillips' right to freely exercise his religion. As JUSTICE GORSUCH explains, the Commission treated Phillips' case differently from a similar case involving three other bakers, for reasons that can only be explained by hostility toward Phillips' religion. See ante, at 2-7 (concurring opinion). The Court agrees that the Commission treated Phillips differently, and it points out that some of the Commissioners made comments disparaging Phillips' religion. See ante, at 12-16. Although the Commissioners' comments are certainly disturbing, the discriminatory application of Colorado's public-accommodations law is enough on its own to violate Phillips' rights. To the extent the Court agrees, I join its opinion.

While Phillips rightly prevails on his free-exercise claim, I write separately to address his free-speech claim. The Court does not address this claim because it has some uncertainties about the record. See ante, at 2. Specifically, the parties dispute whether Phillips refused to create a custom wedding cake for the individual respondents, or whether he refused to sell them any wedding

cake (including a premade one). But the Colorado Court of Appeals resolved this factual dispute in Phillips' favor. The court described his conduct as a refusal to "design and create a cake to celebrate [a] same-sex wedding." Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 276 (2015); see also id., at 286 ("designing and selling a wedding cake"); id., at 283 ("refusing to create a wedding cake"). And it noted that the Commission's order required Phillips to sell "`any product [he] would sell to heterosexual couples,'" including custom wedding cakes. Id., at 286 (emphasis added).

Even after describing his conduct this way, the Court of Appeals concluded that Phillips' conduct was not expressive and was not protected speech. It reasoned that an outside observer would think that Phillips was merely complying with Colorado's public-accommodations law, not expressing a message, and that Phillips could post a disclaimer to that effect. This reasoning flouts bedrock principles of our free-speech jurisprudence and would justify virtually any law that compels individuals to speak. It should not pass without comment.

I

The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits state laws that abridge the "freedom of speech." When interpreting this command, this Court has distinguished between regulations of speech and regulations of conduct. The latter generally do not abridge the freedom of speech, even if they impose "incidental burdens" on expression. Sorrell v. IMS Health Inc., 564 U. S. 552, 567 (2011). As the Court explains today, public-accommodations laws usually regulate conduct. Ante, at 9-10 (citing Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557, 572 (1995)). "[A]s a general matter," public-accommodations laws do not "target speech" but instead prohibit "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services." Id., at 572 (emphasis added).

Although public-accommodations laws generally regulate conduct, particular applications of them can burden protected speech. When a public-accommodations law "ha[s] the effect of declaring . . . speech itself to be the public accommodation," the First Amendment applies with full force. Id., at 573; accord, Boy Scouts of America v. Dale, 530 U. S. 640, 657-659 (2000). In Hurley, for example, a Massachusetts public-accommodations law prohibited "`any distinction, discrimination or restriction on account of . . . sexual orientation . . . relative to the admission of any person to, or treatment in any place of public accommodation.'" 515 U. S., at 561 (quoting Mass. Gen. Laws §272:98 (1992); ellipsis in original). When this law required the sponsor of a St. Patrick's Day parade to include a parade unit of gay, lesbian, and bisexual Irish-Americans, the Court unanimously held that the law violated the sponsor's right to free speech. Parades are "a form of expression," this Court explained, and the application of the public-accommodations law "alter[ed] the expressive content" of the parade by forcing the sponsor to add a new unit. 515 U. S., at 568, 572-573. The addition of that unit compelled the organizer to "bear witness to the fact that some Irish are gay, lesbian, or bisexual"; "suggest. . . that people of their sexual orientation have as much claim to unqualified social acceptance as heterosexuals"; and imply that their participation "merits celebration." Id., at 574. While this Court acknowledged that the unit's exclusion might have been "misguided, or even hurtful," ibid., it rejected the notion that

governments can mandate "thoughts and statements acceptable to some groups or, indeed, all people" as the "antithesis" of free speech, id., at 579; accord, Dale, supra, at 660-661.

The parade in Hurley was an example of what this Court has termed "expressive conduct." See 515 U. S., at 568-569. This Court has long held that "the Constitution looks beyond written or spoken words as mediums of expression," id., at 569, and that "[s]ymbolism is a primitive but effective way of communicating ideas," West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 632 (1943). Thus, a person's "conduct may be `sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" Texas v. Johnson, 491 U. S. 397, 404 (1989). Applying this principle, the Court has recognized a wide array of conduct that can qualify as expressive, including nude dancing, burning the American flag, flying an upside-down American flag with a taped-on peace sign, wearing a military uniform, wearing a black armband, conducting a silent sit-in, refusing to salute the American flag, and flying a plain red flag.[1]

Of course, conduct does not qualify as protected speech simply because "the person engaging in [it] intends thereby to express an idea." United States v. O'Brien, 391 U. S. 367, 376 (1968). To determine whether conduct is sufficiently expressive, the Court asks whether it was "intended to be communicative" and, "in context, would reasonably be understood by the viewer to be communicative." Clark v. Community for Creative Non-Violence, 468 U. S. 288, 294 (1984). But a "`particularized message'" is not required, or else the freedom of speech "would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schöenberg, or Jabberwocky verse of Lewis Carroll." Hurley, 515 U. S., at 569.

Once a court concludes that conduct is expressive, the Constitution limits the government's authority to restrict or compel it. "[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide `what not to say'" and "tailor" the content of his message as he sees fit. Id., at 573 (quoting Pacific Gas & Elec. Co. v. Public Util. Comm'n of Cal., 475 U. S. 1, 16 (1986) (plurality opinion)). This rule "applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." Hurley, supra, at 573. And it "makes no difference" whether the government is regulating the "creati[on], distributi[on], or consum[ption]" of the speech. Brown v. Entertainment Merchants Assn., 564 U. S. 786, 792, n. 1 (2011).

II

A

The conduct that the Colorado Court of Appeals ascribed to Phillips—creating and designing custom wedding cakes—is expressive. Phillips considers himself an artist. The logo for Masterpiece Cakeshop is an artist's paint palate with a paintbrush and baker's whisk. Behind the counter Phillips has a picture that depicts him as an artist painting on a canvas. Phillips takes exceptional care with each cake that he creates—sketching the design out on paper, choosing the color scheme, creating the frosting and decorations, baking and sculpting the cake, decorating it, and delivering it to the wedding. Examples of his creations can be seen on Masterpiece's website. See http://masterpiececakes.com/wedding-cakes (as last visited June 1, 2018).

Phillips is an active participant in the wedding celebration. He sits down with each couple for a consultation before he creates their custom wedding cake. He discusses their preferences, their personalities, and the details of their wedding to ensure that each cake reflects the couple who ordered it. In addition to creating and delivering the cake—a focal point of the wedding celebration—Phillips sometimes stays and interacts with the guests at the wedding. And the guests often recognize his creations and seek his bakery out afterward. Phillips also sees the inherent symbolism in wedding cakes. To him, a wedding cake inherently communicates that "a wedding has occurred, a marriage has begun, and the couple should be celebrated." App. 162.

Wedding cakes do, in fact, communicate this message. A tradition from Victorian England that made its way to America after the Civil War, "[w]edding cakes are so packed with symbolism that it is hard to know where to begin." M. Krondl, Sweet Invention: A History of Dessert 321 (2011) (Krondl); see also ibid. (explaining the symbolism behind the color, texture, flavor, and cutting of the cake). If an average person walked into a room and saw a white, multi-tiered cake, he would immediately know that he had stumbled upon a wedding. The cake is "so standardised and inevitable a part of getting married that few ever think to question it." Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 95 (1987). Almost no wedding, no matter how spartan, is missing the cake. See id., at 98. "A whole series of events expected in the context of a wedding would be impossible without it: an essential photograph, the cutting, the toast, and the distribution of both cake and favours at the wedding and afterwards." Ibid. Although the cake is eventually eaten, that is not its primary purpose. See id., at 95 ("It is not unusual to hear people declaring that they do not like wedding cake, meaning that they do not like to eat it. This includes people who are, without question, having such cakes for their weddings"); id., at 97 ("Nothing is made of the eating itself"); Krondl 320-321 (explaining that wedding cakes have long been described as "inedible"). The cake's purpose is to mark the beginning of a new marriage and to celebrate the couple.[2]

Accordingly, Phillips' creation of custom wedding cakes is expressive. The use of his artistic talents to create a well-recognized symbol that celebrates the beginning of a marriage clearly communicates a message—certainly more so than nude dancing, Barnes v. Glen Theatre, Inc., 501 U. S. 560, 565-566 (1991), or flying a plain red flag, Stromberg v. California, 283 U. S. 359, 369 (1931).[3] By forcing Phillips to create custom wedding cakes for same-sex weddings, Colorado's public-accommodations law "alter[s] the expressive content" of his message. Hurley, 515 U. S., at 572. The meaning of expressive conduct, this Court has explained, depends on "the context in which it occur[s]." Johnson, 491 U. S., at 405. Forcing Phillips to make custom wedding cakes for same-sex marriages requires him to, at the very least, acknowledge that same-sex weddings are "weddings" and suggest that they should be celebrated—the precise message he believes his faith forbids. The First Amendment prohibits Colorado from requiring Phillips to "bear witness to [these] fact[s]," Hurley, 515 U. S., at 574, or to "affir[m] . . . a belief with which [he] disagrees," id., at 573.

B

The Colorado Court of Appeals nevertheless concluded that Phillips' conduct was "not sufficiently expressive" to be protected from state compulsion. 370 P. 3d, at 283. It noted that a

reasonable observer would not view Phillips' conduct as "an endorsement of same-sex marriage," but rather as mere "compliance" with Colorado's public-accommodations law. Id., at 286-287 (citing Rumsfeld v. Forum for Academic and Institutional Rights, Inc., 547 U. S. 47, 64-65 (2006) (FAIR); Rosenberger v. Rector and Visitors of Univ. of Va., 515 U. S. 819, 841-842 (1995); PruneYard Shopping Center v. Robins, 447 U. S. 74, 76-78 (1980)). It also emphasized that Masterpiece could "disassociat[e]" itself from same-sex marriage by posting a "disclaimer" stating that Colorado law "requires it not to discriminate" or that "the provision of its services does not constitute an endorsement." 370 P. 3d, at 288. This reasoning is badly misguided.

1.

The Colorado Court of Appeals was wrong to conclude that Phillips' conduct was not expressive because a reasonable observer would think he is merely complying with Colorado's public-accommodations law. This argument would justify any law that compelled protected speech. And, this Court has never accepted it. From the beginning, this Court's compelled-speech precedents have rejected arguments that "would resolve every issue of power in favor of those in authority." Barnette, 319 U. S., at 636. Hurley, for example, held that the application of Massachusetts' public-accommodations law "requir[ed] [the organizers] to alter the expressive content of their parade." 515 U. S., at 572-573. It did not hold that reasonable observers would view the organizers as merely complying with Massachusetts' public-accommodations law.

The decisions that the Colorado Court of Appeals cited for this proposition are far afield. It cited three decisions where groups objected to being forced to provide a forum for a third party's speech. See FAIR, supra, at 51 (law school refused to allow military recruiters on campus); Rosenberger, supra, at 822-823 (public university refused to provide funds to a religious student paper); PruneYard, supra, at 77 (shopping center refused to allow individuals to collect signatures on its property). In those decisions, this Court rejected the argument that requiring the groups to provide a forum for third-party speech also required them to endorse that speech. See FAIR, supra, at 63-65; Rosenberger, supra, at 841-842; PruneYard, supra, at 85-88. But these decisions do not suggest that the government can force speakers to alter their own message. See Pacific Gas & Elec., 475 U. S., at 12 ("Notably absent from PruneYard was any concern that access . . . might affect the shopping center owner's exercise of his own right to speak"); Hurley, supra, at 580 (similar).

The Colorado Court of Appeals also noted that Masterpiece is a "for-profit bakery" that "charges its customers." 370 P. 3d, at 287. But this Court has repeatedly rejected the notion that a speaker's profit motive gives the government a freer hand in compelling speech. See Pacific Gas & Elec., supra, at 8, 16 (collecting cases); Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U. S. 748, 761 (1976) (deeming it "beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is `sold' for profit"). Further, even assuming that most for-profit companies prioritize maximizing profits over communicating a message, that is not true for Masterpiece Cakeshop. Phillips routinely sacrifices profits to ensure that Masterpiece operates in a way that represents his Christian faith. He is not open on Sundays, he pays his employees a higher-than-average wage, and he loans them money in times of need. Phillips also refuses to bake cakes containing alcohol, cakes with racist or homophobic

messages, cakes criticizing God, and cakes celebrating Halloween—even though Halloween is one of the most lucrative seasons for bakeries. These efforts to exercise control over the messages that Masterpiece sends are still more evidence that Phillips' conduct is expressive. See Miami Herald Publishing Co. v. Tornillo, 418 U. S. 241, 256-258 (1974); Walker v. Texas Div., Sons of Confederate Veterans, Inc., 576 U. S. ___, ___ (2015) (slip op., at 15).

2.

The Colorado Court of Appeals also erred by suggesting that Phillips could simply post a disclaimer, disassociating Masterpiece from any support for same-sex marriage. Again, this argument would justify any law compelling speech. And again, this Court has rejected it. We have described similar arguments as "beg[ging] the core question." Tornillo, supra, at 256. Because the government cannot compel speech, it also cannot "require speakers to affirm in one breath that which they deny in the next." Pacific Gas & Elec., 475 U. S., at 16; see also id., at 15, n. 11 (citing PruneYard, 447 U. S., at 99 (Powell, J., concurring in part and concurring in judgment)). States cannot put individuals to the choice of "be[ing] compelled to affirm someone else's belief" or "be[ing] forced to speak when [they] would prefer to remain silent." Id., at 99.

III

Because Phillips' conduct (as described by the Colorado Court of Appeals) was expressive, Colorado's public-accommodations law cannot penalize it unless the law withstands strict scrutiny. Although this Court sometimes reviews regulations of expressive conduct under the more lenient test articulated in O'Brien [4] that test does not apply unless the government would have punished the conduct regardless of its expressive component. See, e.g., Barnes, 501 U. S., at 566-572 (applying O'Brien to evaluate the application of a general nudity ban to nude dancing); Clark, 468 U. S., at 293 (applying O'Brien to evaluate the application of a general camping ban to a demonstration in the park). Here, however, Colorado would not be punishing Phillips if he refused to create any custom wedding cakes; it is punishing him because he refuses to create custom wedding cakes that express approval of same-sex marriage. In cases like this one, our precedents demand "`the most exacting scrutiny.'" Johnson, 491 U. S., at 412; accord, Holder v. Humanitarian Law Project, 561 U. S. 1, 28 (2010).

The Court of Appeals did not address whether Colorado's law survives strict scrutiny, and I will not do so in the first instance. There is an obvious flaw, however, with one of the asserted justifications for Colorado's law. According to the individual respondents, Colorado can compel Phillips' speech to prevent him from "`denigrat[ing] the dignity'" of same-sex couples, "`assert[ing] [their] inferiority,'" and subjecting them to "`humiliation, frustration, and embarrassment.'" Brief for Respondents Craig et al. 39 (quoting J. E. B. v. Alabama ex rel. T. B., 511 U. S. 127, 142 (1994); Heart of Atlanta Motel, Inc. v. United States, 379 U. S. 241, 292 (1964) (Goldberg, J., concurring)). These justifications are completely foreign to our free-speech jurisprudence.

States cannot punish protected speech because some group finds it offensive, hurtful, stigmatic, unreasonable, or undignified. "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds

the idea itself offensive or disagreeable." Johnson, supra, at 414. A contrary rule would allow the government to stamp out virtually any speech at will. See Morse v. Frederick, 551 U. S. 393, 409 (2007) ("After all, much political and religious speech might be perceived as offensive to some"). As the Court reiterates today, "it is not . . . the role of the State or its officials to prescribe what shall be offensive." Ante, at 16. "`Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.'" Hustler Magazine, Inc. v. Falwell, 485 U. S. 46, 55 (1988); accord, Johnson, supra, at 408-409. If the only reason a public-accommodations law regulates speech is "to produce a society free of . . . biases" against the protected groups, that purpose is "decidedly fatal" to the law's constitutionality, "for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression." Hurley, 515 U. S., at 578-579; see also United States v. Playboy Entertainment Group, Inc., 529 U. S. 803, 813 (2000) ("Where the designed benefit of a content-based speech restriction is to shield the sensibilities of listeners, the general rule is that the right of expression prevails"). "[A] speech burden based on audience reactions is simply government hostility . . . in a different guise." Matal v. Tam, 582 U. S. ___, ___ (2017) (KENNEDY, J., concurring in part and concurring in judgment) (slip op., at 4).

Consider what Phillips actually said to the individual respondents in this case. After sitting down with them for a consultation, Phillips told the couple, "`I'll make your birthday cakes, shower cakes, sell you cookies and brownies, I just don't make cakes for same sex weddings.'" App. 168. It is hard to see how this statement stigmatizes gays and lesbians more than blocking them from marching in a city parade, dismissing them from the Boy Scouts, or subjecting them to signs that say "God Hates Fags"—all of which this Court has deemed protected by the First Amendment. See Hurley, supra, at 574-575; Dale, 530 U. S., at 644; Snyder v. Phelps, 562 U. S. 443, 448 (2011). Moreover, it is also hard to see how Phillips' statement is worse than the racist, demeaning, and even threatening speech toward blacks that this Court has tolerated in previous decisions. Concerns about "dignity" and "stigma" did not carry the day when this Court affirmed the right of white supremacists to burn a 25-foot cross, Virginia v. Black, 538 U. S. 343 (2003); conduct a rally on Martin Luther King Jr.'s birthday, Forsyth County v. Nationalist Movement, 505 U. S. 123 (1992); or circulate a film featuring hooded Klan members who were brandishing weapons and threatening to "`Bury the niggers,'" Brandenburg v. Ohio, 395 U. S. 444, 446, n. 1 (1969) (per curiam).

Nor does the fact that this Court has now decided Obergefell v. Hodges, 576 U. S. ___ (2015), somehow diminish Phillips' right to free speech. "It is one thing . . . to conclude that the Constitution protects a right to same-sex marriage; it is something else to portray everyone who does not share [that view] as bigoted" and unentitled to express a different view. Id., at ___ (ROBERTS, C. J., dissenting) (slip op., at 29). This Court is not an authority on matters of conscience, and its decisions can (and often should) be criticized. The First Amendment gives individuals the right to disagree about the correctness of Obergefell and the morality of same-sex marriage. Obergefell itself emphasized that the traditional understanding of marriage "long has been held—and continues to be held— in good faith by reasonable and sincere people here and throughout the world." Id., at ___ (majority opinion) (slip op., at 4). If Phillips' continued adherence to that understanding makes him a minority after Obergefell, that is all the more

reason to insist that his speech be protected. See Dale, supra, at 660 ("[T]he fact that [the social acceptance of homosexuality] may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view").

* * *

In Obergefell, I warned that the Court's decision would "inevitabl[y] . . . come into conflict" with religious liberty, "as individuals . . . are confronted with demands to participate in and endorse civil marriages between same-sex couples." 576 U. S., at ___ (dissenting opinion) (slip op., at 15). This case proves that the conflict has already emerged. Because the Court's decision vindicates Phillips' right to free exercise, it seems that religious liberty has lived to fight another day. But, in future cases, the freedom of speech could be essential to preventing Obergefell from being used to "stamp out every vestige of dissent" and "vilify Americans who are unwilling to assent to the new orthodoxy." Id., at ___ (ALITO, J., dissenting) (slip op., at 6). If that freedom is to maintain its vitality, reasoning like the Colorado Court of Appeals' must be rejected.

JUSTICE GINSBURG, with whom JUSTICE SOTOMAYOR joins, dissenting.

There is much in the Court's opinion with which I agree. "[I]t is a general rule that [religious and philosophical] objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law." Ante, at 9. "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." Ante, at 10. "[P]urveyors of goods and services who object to gay marriages for moral and religious reasons [may not] put up signs saying `no goods or services will be sold if they will be used for gay marriages.'" Ante, at 12. Gay persons may be spared from "indignities when they seek goods and services in an open market." Ante, at 18.[1] I strongly disagree, however, with the Court's conclusion that Craig and Mullins should lose this case. All of the above-quoted statements point in the opposite direction.

The Court concludes that "Phillips' religious objection was not considered with the neutrality that the Free Exercise Clause requires." Ante, at 17. This conclusion rests on evidence said to show the Colorado Civil Rights Commission's (Commission) hostility to religion. Hostility is discernible, the Court maintains, from the asserted "disparate consideration of Phillips' case compared to the cases of" three other bakers who refused to make cakes requested by William Jack, an amicus here. Ante, at 18. The Court also finds hostility in statements made at two public hearings on Phillips' appeal to the Commission. Ante, at 12-14. The different outcomes the Court features do not evidence hostility to religion of the kind we have previously held to signal a free-exercise violation, nor do the comments by one or two members of one of the four decisionmaking entities considering this case justify reversing the judgment below.

I

On March 13, 2014—approximately three months after the ALJ ruled in favor of the same-sex couple, Craig and Mullins, and two months before the Commission heard Phillips' appeal from that decision—William Jack visited three Colorado bakeries. His visits followed a similar pattern. He requested two cakes

"made to resemble an open Bible. He also requested that each cake be decorated with Biblical verses. [He] requested that one of the cakes include an image of two groomsmen, holding hands, with a red `X' over the image. On one cake, he requested [on] one side[,]. . . `God hates sin. Psalm 45:7' and on the opposite side of the cake `Homosexuality is a detestable sin. Leviticus 18:2.' On the second cake, [the one] with the image of the two groomsmen covered by a red `X' [Jack] requested [these words]: `God loves sinners' and on the other side `While we were yet sinners Christ died for us. Romans 5:8.'" App. to Pet. for Cert. 319a; see id., at 300a, 310a.

In contrast to Jack, Craig and Mullins simply requested a wedding cake: They mentioned no message or anything else distinguishing the cake they wanted to buy from any other wedding cake Phillips would have sold.

One bakery told Jack it would make cakes in the shape of Bibles, but would not decorate them with the requested messages; the owner told Jack her bakery "does not discriminate" and "accept[s] all humans." Id., at 301a (internal quotation marks omitted). The second bakery owner told Jack he "had done open Bibles and books many times and that they look amazing," but declined to make the specific cakes Jack described because the baker regarded the messages as "hateful." Id., at 310a (internal quotation marks omitted). The third bakery, according to Jack, said it would bake the cakes, but would not include the requested message. Id., at 319a.[2]

Jack filed charges against each bakery with the Colorado Civil Rights Division (Division). The Division found no probable cause to support Jack's claims of unequal treatment and denial of goods or services based on his Christian religious beliefs. Id., at 297a, 307a, 316a. In this regard, the Division observed that the bakeries regularly produced cakes and other baked goods with Christian symbols and had denied other customer requests for designs demeaning people whose dignity the Colorado Antidiscrimination Act (CADA) protects. See id., at 305a, 314a, 324a. The Commission summarily affirmed the Division's no-probable-cause finding. See id., at 326a-331a.

The Court concludes that "the Commission's consideration of Phillips' religious objection did not accord with its treatment of [the other bakers'] objections." Ante, at 15. See also ante, at 5-7 (GORSUCH, J., concurring). But the cases the Court aligns are hardly comparable. The bakers would have refused to make a cake with Jack's requested message for any customer, regardless of his or her religion. And the bakers visited by Jack would have sold him any baked goods they would have sold anyone else. The bakeries' refusal to make Jack cakes of a kind they would not make for any customer scarcely resembles Phillips' refusal to serve Craig and Mullins: Phillips would not sell to Craig and Mullins, for no reason other than their sexual orientation, a cake of the kind he regularly sold to others. When a couple contacts a bakery for a wedding cake, the product they are seeking is a cake celebrating their wedding—not a cake celebrating heterosexual weddings or same-sex weddings—and that is the service Craig and Mullins were

denied. Cf. ante, at 3-4, 9-10 (GORSUCH, J., concurring). Colorado, the Court does not gainsay, prohibits precisely the discrimination Craig and Mullins encountered. See supra, at 1. Jack, on the other hand, suffered no service refusal on the basis of his religion or any other protected characteristic. He was treated as any other customer would have been treated—no better, no worse.[3]

The fact that Phillips might sell other cakes and cookies to gay and lesbian customers[4] was irrelevant to the issue Craig and Mullins' case presented. What matters is that Phillips would not provide a good or service to a same-sex couple that he would provide to a heterosexual couple. In contrast, the other bakeries' sale of other goods to Christian customers was relevant: It shows that there were no goods the bakeries would sell to a non-Christian customer that they would refuse to sell to a Christian customer. Cf. ante, at 15.

Nor was the Colorado Court of Appeals'"difference in treatment of these two instances . . . based on the government's own assessment of offensiveness." Ante, at 16. Phillips declined to make a cake he found offensive where the offensiveness of the product was determined solely by the identity of the customer requesting it. The three other bakeries declined to make cakes where their objection to the product was due to the demeaning message the requested product would literally display. As the Court recognizes, a refusal "to design a special cake with words or images . . . might be different from a refusal to sell any cake at all." Ante, at 2.[5] The Colorado Court of Appeals did not distinguish Phillips and the other three bakeries based simply on its or the Division's finding that messages in the cakes Jack requested were offensive while any message in a cake for Craig and Mullins was not. The Colorado court distinguished the cases on the ground that Craig and Mullins were denied service based on an aspect of their identity that the State chose to grant vigorous protection from discrimination. See App. to Pet. for Cert. 20a, n. 8 ("The Division found that the bakeries did not refuse [Jack's] request because of his creed, but rather because of the offensive nature of the requested message. . . . [T]here was no evidence that the bakeries based their decisions on [Jack's] religion . . . [whereas Phillips] discriminat[ed] on the basis of sexual orientation."). I do not read the Court to suggest that the Colorado Legislature's decision to include certain protected characteristics in CADA is an impermissible government prescription of what is and is not offensive. Cf. ante, at 9-10. To repeat, the Court affirms that "Colorado law can protect gay persons, just as it can protect other classes of individuals, in acquiring whatever products and services they choose on the same terms and conditions as are offered to other members of the public." Ante, at 10.

II

Statements made at the Commission's public hearings on Phillips' case provide no firmer support for the Court's holding today. Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome Phillips' refusal to sell a wedding cake to Craig and Mullins. The proceedings involved several layers of independent decisionmaking, of which the Commission was but one. See App. to Pet. for Cert. 5a-6a. First, the Division had to find probable cause that Phillips violated CADA. Second, the ALJ entertained the parties' cross-motions for summary judgment. Third, the Commission heard Phillips' appeal. Fourth, after the Commission's ruling, the Colorado Court of

Appeals considered the case de novo. What prejudice infected the determinations of the adjudicators in the case before and after the Commission? The Court does not say. Phillips' case is thus far removed from the only precedent upon which the Court relies, Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U. S. 520 (1993), where the government action that violated a principle of religious neutrality implicated a sole decisionmaking body, the city council, see id., at 526-528.

* * *

For the reasons stated, sensible application of CADA to a refusal to sell any wedding cake to a gay couple should occasion affirmance of the Colorado Court of Appeals' judgment. I would so rule.

[*] JUSTICE GORSUCH disagrees. In his view, the Jack cases and the Phillips case must be treated the same because the bakers in all those cases "would not sell the requested cakes to anyone." Post, at 4. That description perfectly fits the Jack cases—and explains why the bakers there did not engage in unlawful discrimination. But it is a surprising characterization of the Phillips case, given that Phillips routinely sells wedding cakes to opposite-sex couples. JUSTICE GORSUCH can make the claim only because he does not think a "wedding cake" is the relevant product. As JUSTICE GORSUCH sees it, the product that Phillips refused to sell here—and would refuse to sell to anyone—was a "cake celebrating same-sex marriage." Ibid.; see post, at 3, 6, 8-9. But that is wrong. The cake requested was not a special "cake celebrating same-sex marriage." It was simply a wedding cake—one that (like other standard wedding cakes) is suitable for use at same-sex and opposite-sex weddings alike. See ante, at 4 (majority opinion) (recounting that Phillips did not so much as discuss the cake's design before he refused to make it). And contrary to JUSTICE GORSUCH'S view, a wedding cake does not become something different whenever a vendor like Phillips invests its sale to particular customers with "religious significance." Post, at 11. As this Court has long held, and reaffirms today, a vendor cannot escape a public accommodations law because his religion disapproves selling a product to a group of customers, whether defined by sexual orientation, race, sex, or other protected trait. See Newman v. Piggie Park Enterprises, Inc., 390 U. S. 400, 402, n. 5 (1968) (per curiam) (holding that a barbeque vendor must serve black customers even if he perceives such service as vindicating racial equality, in violation of his religious beliefs); ante, at 9. A vendor can choose the products he sells, but not the customers he serves—no matter the reason. Phillips sells wedding cakes. As to that product, he unlawfully discriminates: He sells it to opposite-sex but not to same-sex couples. And on that basis—which has nothing to do with Phillips' religious beliefs—Colorado could have distinguished Phillips from the bakers in the Jack cases, who did not engage in any prohibited discrimination.

[1] Barnes v. Glen Theatre, Inc., 501 U. S. 560, 565-566 (1991); Texas v. Johnson, 491 U. S. 397, 405-406 (1989); Spence v. Washington, 418 U. S. 405, 406, 409-411 (1974) (per curiam); Schacht v. United States, 398 U. S. 58, 62-63 (1970); Tinker v. Des Moines Independent Community School Dist., 393 U. S. 503, 505-506 (1969); Brown v. Louisiana, 383 U. S. 131, 141-142 (1966) (opinion of Fortas, J.); West Virginia Bd. of Ed. v. Barnette, 319 U. S. 624, 633-634 (1943); Stromberg v. California, 283 U. S. 359, 361, 369 (1931).

[2] The Colorado Court of Appeals acknowledged that "a wedding cake, in some circumstances, may convey a particularized message celebrating same-sex marriage," depending on its "design" and whether it has "written inscriptions." Craig v. Masterpiece Cakeshop, Inc., 370 P. 3d 272, 288 (2015). But a wedding cake needs no particular design or written words to communicate the basic message that a wedding is occurring, a marriage has begun, and the couple should be celebrated. Wedding cakes have long varied in color, decorations, and style, but those differences do not prevent people from recognizing wedding cakes as wedding cakes. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 96 (1987). And regardless, the Commission's order does not distinguish between plain wedding cakes and wedding cakes with particular designs or inscriptions; it requires Phillips to make any wedding cake for a same-sex wedding that he would make for an opposite-sex wedding.

[3] The dissent faults Phillips for not "submitting . . . evidence" that wedding cakes communicate a message. Post, at 2, n. 1 (opinion of GINSBURG, J.). But this requirement finds no support in our precedents. This Court did not insist that the parties submit evidence detailing the expressive nature of parades, flags, or nude dancing. See Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U. S. 557, 568-570 (1995); Spence, 418 U. S., at 410-411; Barnes, 501 U. S., at 565-566. And we do not need extensive evidence here to conclude that Phillips' artistry is expressive, see Hurley, 515 U. S., at 569, or that wedding cakes at least communicate the basic fact that "this is a wedding," see id., at 573-575. Nor does it matter that the couple also communicates a message through the cake. More than one person can be engaged in protected speech at the same time. See id., at 569-570. And by forcing him to provide the cake, Colorado is requiring Phillips to be "intimately connected" with the couple's speech, which is enough to implicate his First Amendment rights. See id., at 576.

[4] "[A] government regulation [of expressive conduct] is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." United States v. O'Brien, 391 U. S. 367, 377 (1968).

[1] As JUSTICE THOMAS observes, the Court does not hold that wedding cakes are speech or expression entitled to First Amendment protection. See ante, at 1 (opinion concurring in part and concurring in judgment). Nor could it, consistent with our First Amendment precedents. JUSTICE THOMAS acknowledges that for conduct to constitute protected expression, the conduct must be reasonably understood by an observer to be communicative. Ante, at 4 (citing Clark v. Community for Creative Non-Violence, 468 U. S. 288, 294 (1984)). The record in this case is replete with Jack Phillips' own views on the messages he believes his cakes convey. See ante, at 5-6 (THOMAS, J., concurring in part and concurring in judgment) (describing how Phillips "considers" and "sees" his work). But Phillips submitted no evidence showing that an objective observer understands a wedding cake to convey a message, much less that the observer understands the message to be the baker's, rather than the marrying couple's. Indeed, some in the wedding industry could not explain what message, or whose, a wedding cake conveys. See Charsley, Interpretation and Custom: The Case of the Wedding Cake, 22 Man 93, 100-101

(1987) (no explanation of wedding cakes' symbolism was forthcoming "even amongst those who might be expected to be the experts"); id., at 104-105 (the cake cutting tradition might signify "the bride and groom . . . as appropriating the cake" from the bride's parents). And Phillips points to no case in which this Court has suggested the provision of a baked good might be expressive conduct. Cf. ante, at 7, n. 2 (THOMAS, J., concurring in part and concurring in judgment); Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston, Inc., 515 U. S. 557, 568-579 (1995) (citing previous cases recognizing parades to be expressive); Barnes v. Glen Theatre, Inc., 501 U. S. 560, 565 (1991) (noting precedents suggesting nude dancing is expressive conduct); Spence v. Washington, 418 U. S. 405, 410 (1974) (observing the Court's decades-long recognition of the symbolism of flags).

[2] The record provides no ideological explanation for the bakeries' refusals. Cf. ante, at 1-2, 9, 11 (GORSUCH, J., concurring) (describing Jack's requests as offensive to the bakers'"secular" convictions).

[3] JUSTICE GORSUCH argues that the situations "share all legally salient features." Ante, at 4 (concurring opinion). But what critically differentiates them is the role the customer's "statutorily protected trait," ibid., played in the denial of service. Change Craig and Mullins' sexual orientation (or sex), and Phillips would have provided the cake. Change Jack's religion, and the bakers would have been no more willing to comply with his request. The bakers' objections to Jack's cakes had nothing to do with "religious opposition to same-sex weddings." Ante, at 6 (GORSUCH, J., concurring). Instead, the bakers simply refused to make cakes bearing statements demeaning to people protected by CADA. With respect to Jack's second cake, in particular, where he requested an image of two groomsmen covered by a red "X" and the lines "God loves sinners" and "While we were yet sinners Christ died for us," the bakers gave not the slightest indication that religious words, rather than the demeaning image, prompted the objection. See supra, at 3. Phillips did, therefore, discriminate because of sexual orientation; the other bakers did not discriminate because of religious belief; and the Commission properly found discrimination in one case but not the other. Cf. ante, at 4-6 (GORSUCH, J., concurring).

[4] But see ante, at 7 (majority opinion) (acknowledging that Phillips refused to sell to a lesbian couple cupcakes for a celebration of their union).

[5] The Court undermines this observation when later asserting that the treatment of Phillips, as compared with the treatment of the other three bakeries, "could reasonably be interpreted as being inconsistent as to the question of whether speech is involved." Ante, at 15. But recall that, while Jack requested cakes with particular text inscribed, Craig and Mullins were refused the sale of any wedding cake at all. They were turned away before any specific cake design could be discussed. (It appears that Phillips rarely, if ever, produces wedding cakes with words on them—or at least does not advertise such cakes. See Masterpiece Cakeshop, Wedding, http://www.masterpiececakes.com/wedding-cakes (as last visited June 1, 2018) (gallery with 31 wedding cake images, none of which exhibits words).) The Division and the Court of Appeals could rationally and lawfully distinguish between a case involving disparaging text and images and a case involving a wedding cake of unspecified design. The distinction is not between a cake with text and one without, see ante, at 8-9 (GORSUCH, J., concurring); it is between a cake with a particular design and one whose form was never even discussed.

883 F.3d 100 (2018)

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

v.

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

Docket No. 15-3775 August Term, 2017.

United States Court of Appeals, Second Circuit.

Argued: September 26, 2017.
Decided: February 26, 2018.

Donald Zarda brought this suit against his former employer alleging, *inter alia,* sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e, *et seq.* In particular, Zarda claimed that he was fired after revealing his sexual orientation to a client. The United States District Court for the Eastern District of New York (Bianco, *J.*) granted summary judgment to the defendants on the ground that Zarda had failed to show that he had been discriminated against on the basis of his sex. After the Equal Employment Opportunity Commission ("EEOC") decided *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), holding that sex discrimination includes sexual orientation discrimination, Zarda asked the district court to reinstate his Title VII claim. The district court, citing our decision in *Simonton v. Runyon,* 232 F.3d 33, 35 (2d Cir. 2000), declined to do so. Zarda appealed and a panel of this Court affirmed.

We convened this rehearing en banc to consider whether Title VII prohibits discrimination on the basis of sexual orientation such that our precedents to the contrary should be overruled. We now hold that sexual orientation discrimination constitutes a form of discrimination "because of . . . sex," in violation of Title VII, and overturn *Simonton* and *Dawson v. Bumble & Bumble,* 398 F.3d 211, 217-23 (2d Cir. 2005), to the extent they held otherwise. We therefore VACATE the district court's judgment on the Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects.

Katzmann, C.J., filed the majority opinion in which Hall, Chin, Carney, and Droney, JJ., joined in full, Jacobs, J., joined as to Parts I and II.B.3, Pooler, J., joined as to all but Part II.B.1.b, Sack, J., joined as to Parts I, II.A, II.B.3, and II.C, and Lohier, J., joined as to Parts I, II.A, and II.B.1.a.

Jacobs, J., filed a concurring opinion.

Cabranes, J., filed an opinion concurring in the judgment.

Sack, J., filed a concurring opinion.

Lohier, J., filed a concurring opinion.

Lynch, J., filed a dissenting opinion in which Livingston, J., joined as to Parts I, II, and III.

Livingston, J., filed a dissenting opinion.

Raggi, J., filed a dissenting opinion.

Katzmann, Chief Judge:

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

At the time *Simonton* and *Dawson* were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission ("EEOC" or "Commission"). *See, e.g.,* Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 289 (3d Cir. 2009); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999);[3] Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); *see also Johnson v. Frank,* EEOC Decision No. 01911827, 1991 WL 1189760, at *3 (Dec. 19, 1991). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that "sexual orientation is inherently a `sex-based consideration;' accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII." *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by Blum, 597 F.2d at 938, which "ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting *en banc*." Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1257 (11th Cir.), *cert. denied,* ___ U.S. ___, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017). One month later, the Seventh Circuit, sitting en banc, took "a fresh look at [its] position in light of developments at the Supreme Court extending over two decades" and held that "discrimination on the basis of sexual orientation is a form of sex discrimination." Hively, 853 F.3d at 340-41. In addition, a concurring opinion of this Court recently called "for the Court to revisit" this question, emphasizing the "changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued," and identifying multiple arguments that

support the conclusion that sexual orientation discrimination is barred by Title VII. *Christiansen v. Omnicom Grp., Inc.,* 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, *C.J.,* concurring) ("Christiansen and *amici* advance three arguments, none previously addressed by this Court...."); *see also id.* at 204 ("Neither *Simonton* nor *Dawson* addressed [the but-for] argument.").

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

We therefore VACATE the district court's judgment on Zarda's Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects.

BACKGROUND

The facts and procedural history of this case are discussed in detail in our prior panel decision. *See Zarda v. Altitude Express,* 855 F.3d 76, 79-81 (2d Cir. 2017). We recite them only as necessary to address the legal question under consideration.

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda's co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay "and ha[d] an ex-husband to prove it." J.A. 400 ¶ 23. Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda's alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda's boss, who fired shortly Zarda thereafter. Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

One month later, Zarda filed a discrimination charge with the EEOC concerning his termination. Zarda claimed that "in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." Special Appendix ("S.A.") 3. In particular, he claimed that "[a]ll of the men at [his workplace] made light of the intimate nature of being strapped to a member of the opposite sex," but that he was fired because he "honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." S.A. 5.

In September 2010, Zarda brought a lawsuit in federal court alleging, *inter alia,* sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of New York law. Defendants moved for summary judgment arguing that Zarda's Title VII claim should be dismissed because, although "Plaintiff testifie[d] repeatedly that he believe[d] the reason he was terminated [was] because of his sexual orientation ... [,] under Title VII, a gender stereotype cannot be predicated on sexual orientation." Dist. Ct. Dkt. No. 109 at 3 (citing *Simonton,* 232 F.3d at 35). In March 2014, the district court granted summary judgment to the defendants on the Title VII claim. As relevant here, the district court concluded that, although there was sufficient evidence to permit plaintiff to proceed with his claim for sexual orientation discrimination under New York law, plaintiff had failed to establish a prima facie case of gender stereotyping discrimination under Title VII.

While Zarda's remaining claims were still pending, the EEOC decided *Baldwin,* holding that "allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex." 2015 WL 4397641 at *10. The Commission identified three ways to illustrate what it described as the "inescapable link between allegations of sexual orientation discrimination and sex discrimination." *Id.* at *5. First, sexual orientation discrimination, such as suspending a lesbian employee for displaying a photo of her female spouse on her desk while not suspending a man for displaying a photo of his female spouse, "is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex." *Id.* Second, it is "associational discrimination" because "an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex." *Id.* at *6. Lastly, sexual orientation discrimination "necessarily involves discrimination based on gender stereotypes," most commonly "heterosexually defined gender norms." *Id.* at *7-8 (internal quotation marks omitted). Shortly thereafter, Zarda moved to have his Title VII claim reinstated based on *Baldwin.* But, the district court denied the motion, concluding that *Simonton* remained binding precedent.

Zarda's surviving claims, which included his claim for sexual orientation discrimination under New York law, went to trial, where defendants prevailed. After judgment was entered for the defendants, Zarda appealed. As relevant here, Zarda argued that *Simonton* should be overturned because the EEOC's reasoning in *Baldwin* demonstrated that *Simonton* was incorrectly decided. By contrast, defendants argued that the court did not need to reach that issue because the jury found that they had not discriminated based on sexual orientation.

The panel held that "Zarda's [federal] sex-discrimination claim [was] properly before [it] because [his state law claim was tried under] a higher standard of causation than required by Title VII." *Zarda,* 855 F.3d at 81. However, the panel "decline[d] Zarda's invitation to revisit our precedent," which "can only be overturned by the entire Court sitting in banc." *Id.* at 82. The Court subsequently ordered this rehearing en banc to revisit *Simonton* and Dawson's holdings that claims of sexual orientation discrimination are not cognizable under Title VII.

DISCUSSION

I. Jurisdiction

We first address the defendants' challenge to our jurisdiction. Article III of the Constitution grants federal courts the authority to hear only "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. As a result, "a federal court has neither the power to render advisory opinions nor `to decide questions that cannot affect the rights of litigants in the case before them.'" *Preiser v. Newkirk,* 422 U.S. 395, 401, 95 S.Ct. 2330, 45 L.Ed.2d 272 (1975) (quoting *North Carolina v. Rice,* 404 U.S. 244, 246, 92 S.Ct. 402, 30 L.Ed.2d 413 (1971)). The defendants argue that any decision on the merits would be an advisory opinion because Zarda did not allege sexual orientation discrimination in his EEOC charge or his federal complaint and therefore the question of whether Title VII applies to sexual orientation discrimination is not properly before us.

Irrespective of whether defendants' argument is actually jurisdictional,[4] its factual premises are patently contradicted by both the record and the position defendants advanced below. Zarda's EEOC complaint explained that he was "making this charge because, in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." S.A. 3.[5] Zarda specified that his supervisor "was hostile to any expression of [his] sexual orientation that did not conform to sex stereotypes," and alleged that he "was fired ... because ... [he] honestly referred to [his] sexual orientation and did not conform to the straight male macho stereotype." S.A. 3, 5. Zarda repeated this claim in his federal complaint, contending that he was "an openly gay man" who was "discharge[ed] because of a homophobic customer" and "because his behavior did not conform to sex stereotypes," in violation of Title VII. J.A. 65, 69, 75.

Defendants plainly understood Zarda's complaint to have raised a claim for sexual orientation discrimination under Title VII. In their motion for summary judgment, defendants argued that Zarda's claim "relies on the fact that Plaintiff is homosexual, not that he failed to comply with male gender norms. Thus, Plaintiff[] merely attempts to bring a defective sexual orientation claim under Title VII, which is legally invalid." Dist. Ct. Dkt. No. 109 at 9 (citing *Dawson,* 398 F.3d at 221). The district court ultimately agreed.

Having interpreted Zarda's Title VII claim as one for sexual orientation discrimination for purposes of insisting that the claim be dismissed, defendants cannot now argue that there is no sexual orientation claim to prevent this Court from reviewing the basis for the dismissal. Both defendants and the district court clearly understood that Zarda had alleged sexual orientation discrimination under Title VII. As a result, Zarda's Title VII claim is neither unexhausted nor unpled, and so it may proceed.[6]

II. Sexual Orientation Discrimination

A. The Scope of Title VII

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

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

42 U.S.C. § 2000e-2(a)(1). This "broad rule of workplace equality," *Harris v. Forklift Sys., Inc.,* 510 U.S. 17, 22, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993), "strike[s] at the entire spectrum of disparate treatment" based on protected characteristics, *L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978) (quoting *Sprogis v. United Air Lines, Inc.,* 444 F.2d 1194, 1198 (7th Cir. 1971)), "regardless of whether the discrimination is directed against majorities or minorities," *Trans World Airlines, Inc. v. Hardison,* 432 U.S. 63, 71-72, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977). As a result, we have stated that "Title VII should be interpreted broadly to achieve equal employment opportunity." *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 935 (2d Cir. 1988) (citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-36, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).

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

Recognizing that Congress intended to make sex "irrelevant" to employment decisions, *Griggs,* 401 U.S. at 436, 91 S.Ct. 849, the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, *Manhart,* 435 U.S. at 711, 98 S.Ct. 1370, and non-conformity with gender norms, *Price Waterhouse,* 490 U.S. at 250-51, 109 S.Ct. 1775. As this Court has recognized, "any meaningful regime of antidiscrimination law must encompass such claims" because, if an employer is "`[f]ree to add non-sex factors, the rankest sort of discrimination'" could be worked against employees by using traits that are associated with sex as a proxy for sex. *Back v. Hastings On Hudson Union Free Sch. Dist.,* 365 F.3d 107, 119 n.9 (2d Cir. 2004) (quoting *Phillips v. Martin Marietta Corp.,* 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, *C.J.,*

dissenting from denial of rehearing en banc)). Applying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just "the principal evil[s] Congress was concerned with when it enacted" the statute in 1964, but also "reasonably comparable evils" that meet the statutory requirements. *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

With this understanding in mind, the question before us is whether an employee's sex is necessarily a motivating factor in discrimination based on sexual orientation. If it is, then sexual orientation discrimination is properly understood as "a subset of actions taken on the basis of sex." *Hively,* 853 F.3d at 343.[7]

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination "because of ... sex" is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination — which is motivated by an employer's opposition to romantic association between particular sexes — is discrimination based on the employee's own sex.

1. Sexual Orientation as a Function of Sex

a. "Because of ... sex"

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

constitutes discriminating against an employee because of (A) the employee's sex, *and* (B) their sexual attraction to individuals of the *same sex.*").[8]

Choosing not to acknowledge the sex-dependent nature of sexual orientation, certain *amici* contend that employers discriminating on the basis of sexual orientation can do so without reference to sex.[9] In support of this assertion, they point to *Price Waterhouse,* where the Supreme Court observed that one way to discern the motivation behind an employment decision is to consider whether, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be" the applicant or employee's sex. 490 U.S. at 250, 109 S.Ct. 1775. Relying on this language, these *amici* argue that a "truthful" response to an inquiry about why an employee was fired would be "I fired him because he is gay," not "I fired him because he is a man." But this semantic sleight of hand is not a defense; it is a distraction. The employer's failure to reference gender directly does not change the fact that a "gay" employee is simply a man who is attracted to men. For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. More broadly, were this Court to credit *amici*'s argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words. *See* 42 U.S.C. § 2000e-2(m). As a result, firing an employee because he is "gay" is a form of sex discrimination.[10]

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

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

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

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

Rogers v. E.E.O.C., 454 F.2d 234, 238 (5th Cir. 1971). Stated differently, because Congress could not anticipate the full spectrum of employment discrimination that would be directed at the protected categories, it falls to courts to give effect to the broad language that Congress used. *See Pullman-Standard v. Swint,* 456 U.S. 273, 276, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982) ("Title VII is a broad remedial measure, designed `to assure equality of employment opportunities.'" (quoting *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 800, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973))).

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

The dissent disagrees with this conclusion. It does not dispute our definition of the word "sex," Lead Dissent at 145, nor does it argue that this word had a different meaning in 1964. Instead, it charges us with "misconceiv[ing] the fundamental public meaning of the language of" Title VII. *Id.* at 143 (emphasis omitted). According to the dissent, the drafters included "sex" in Title VII to "secure the rights of women to equal protection in employment," *id.* at 145, and had no intention of prohibiting sexual orientation discrimination, *id.* at 142-43. We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a "reasonably comparable evil," *Oncale,* 523 U.S. at 79, 118 S.Ct. 998, to sexual harassment and male-on-male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on "the principal concerns of our legislators," *id.* at 79-80, 118 S.Ct. 998 — the centerpiece of the dissent's statutory analysis. Rather, *Oncale* instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed "by the provisions of

our laws." *Id.* The text before us uses broad language, prohibiting discrimination "because of ... sex," which Congress defined as making sex "a motivating factor." 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.[11]

b. "But for" an Employee's Sex

Our conclusion is reinforced by the Supreme Court's test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the "comparative test," determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different "but for that person's sex." *Manhart,* 435 U.S. at 711, 98 S.Ct. 1370 (internal quotation marks omitted). To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. *Hively,* 853 F.3d at 341 (majority). Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). *Id.* at 345. Under this scenario, the Seventh Circuit concluded that, as alleged, Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination. *Id.*

The government,[12] drawing from the dissent in *Hively,* argues that this is an improper comparison. According to this argument, rather than "hold[ing] everything constant except the plaintiff's sex" the *Hively* majority's comparison changed "two variables — the plaintiff's sex and sexual orientation." 853 F.3d at 366 (Sykes, *J.,* dissenting). In other words, the Seventh Circuit compared a lesbian woman with a heterosexual man. As an initial matter, this observation helpfully illustrates that sexual orientation is a function of sex. In the comparison, changing Hively's sex changed her sexual orientation. Case in point.

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

To understand how the test works in practice, consider *Manhart.* There, the Supreme Court evaluated the Los Angeles Department of Water's requirement that female employees make

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

We can also look to the Supreme Court's decision in *Price Waterhouse.* Although that case did not quote *Manhart*'s "but for" language, it involved a similar inquiry: in determining whether discrimination based on particular traits was rooted in sex stereotypes, the Supreme Court asked whether a female accountant would have been denied a promotion based on her aggressiveness and failure to wear jewelry and makeup "if she had been a man." 490 U.S. at 258, 109 S.Ct. 1775. Otherwise said, the Supreme Court compared a man and a woman who exhibited the plaintiff's traits and asked whether they would have experienced different employment outcomes. Notably, being aggressive and not wearing jewelry or makeup is consistent with gender stereotypes for men. Therefore, by changing the plaintiff's gender, the Supreme Court also changed the plaintiff's gender non-conformity.

The government's proposed approach to *Hively,* which would compare a woman attracted to people of the same sex with a man attracted to people of the same sex, adopts the wrong framing. To understand why this is incorrect, consider the mismatch between the facts in the government's comparison and the allegation at issue: Hively did not allege that her employer discriminated against women with same-sex attraction but not men with same-sex attraction. If she had, that would be classic sex discrimination against a subset of women. *See* Lead Dissent at 152 n.20. Instead, Hively claimed that her employer discriminated on the basis of sexual orientation. To address that allegation, the proper question is whether sex is a "motivating factor" in sexual orientation discrimination, *see* 42 U.S.C. § 2000e-2(m), or, said more simply, whether sexual orientation is a function of sex.[13] But, contrary to the government's suggestion, this question cannot be answered by comparing two people with the same sexual orientation. That would be equivalent to comparing the gender non-conforming female plaintiff in *Price Waterhouse* to a gender non-conforming man; such a comparison would not illustrate whether a particular stereotype is sex dependent but only whether the employer discriminates against gender non-conformity in only one gender. Instead, just as *Price Waterhouse* compared a gender non-conforming woman to a gender conforming man, both of whom were aggressive and did not wear makeup or jewelry, the *Hively* court properly determined that sexual orientation is sex dependent by comparing a woman and a man with two different sexual orientations, both of whom were attracted to women.

The government further counters that the comparative test produces false positives in instances where it is permissible to impose different terms of employment on men and women because "the sexes are not similarly situated." Gov. Br. at 16-17 (quoting *Michael M. v. Superior Court of Sonoma Cty.,* 450 U.S. 464, 469, 101 S.Ct. 1200, 67 L.Ed.2d 437 (1981)).[14] For example, the government posits that courts have rejected the comparative test when assessing employer policies regarding sex-segregated bathrooms and different grooming standards for men and women. Similarly, the lead dissent insists that our holding would preclude such policies if "[t]aken to its logical conclusion." Lead Dissent at 151. Both criticisms are misplaced.

A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was "discriminate[d] against ... with respect to his compensation, terms, conditions, or privileges of employment," and (2) that the employer discriminated "because of ... sex." 42 U.S.C. § 2000e-2(a)(1). The comparative test addresses the second prong of that test; it reveals whether an employment practice is "because of ... sex" by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex. In contrast, courts that have addressed challenges to the sex-specific employment practices identified by the government have readily acknowledged that the policies are based on sex and instead focused their analysis on the first prong: whether the policies impose "disadvantageous terms or conditions of employment."[15] *Harris,* 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, *J.,* concurring); *see, e.g., Jespersen v. Harrah's Operating Co.,* 444 F.3d 1104, 1109-10 (9th Cir. 2006) (upholding grooming standards that do not "place[] a greater burden on one gender than the other"); *Knott v. Mo. Pac. R.R. Co.,* 527 F.2d 1249, 1252 (8th Cir. 1975) (concluding that "slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities"); *Willingham v. Macon Tel. Publ'g Co.,* 507 F.2d 1084, 1092 (5th Cir. 1975) (same); *Dodge v. Giant Food, Inc.,* 488 F.2d 1333, 1336-37 (D.C. Cir. 1973) (holding that hair-length regulations, like "the requirement that men and women use separate toilet facilities[,]... do not pose distinct employment disadvantages for one sex").[16] Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is "because of ... sex," and has no bearing on the efficacy of the comparative test.

Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently "but for" his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.[17]

2. Gender Stereotyping

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

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

In *Price Waterhouse,* the Supreme Court concluded that adverse employment actions taken based on the belief that a female accountant should walk, talk, and dress femininely constituted impermissible sex discrimination. *See* 490 U.S. at 250-52, 109 S.Ct. 1775 (plurality); *see also id.* at 259, 109 S.Ct. 1775 (White, *J.,* concurring in the judgment); *id.* at 272-73, 109 S.Ct. 1775 (O'Connor, *J.,* concurring in the judgment).[18] Similarly, *Manhart* stands for the proposition that "employment decisions cannot be predicated on mere `stereotyped' impressions about the characteristics of males or females," and held that female employees could not, by virtue of their status as women, be discriminated against based on the gender stereotype that women generally outlive men. 435 U.S. at 707-08, 711, 98 S.Ct. 1370. Under these principles, employees who experience adverse employment actions as a result of their employer's generalizations about members of their sex, *id.* at 708, 98 S.Ct. 1370, or "as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a claim under Title VII," *Dawson,* 398 F.3d at 218.

Accepting that sex stereotyping violates Title VII, the "crucial question" is "[w]hat constitutes a gender-based stereotype." *Back,* 365 F.3d at 119-20. As demonstrated by *Price Waterhouse,* one way to answer this question is to ask whether the employer who evaluated the plaintiff in "sex-based terms would have criticized her as sharply (or criticized her at all) if she had been a man." 490 U.S. at 258, 109 S.Ct. 1775. Similarly, this Court has observed that the question of whether there has been improper reliance on sex stereotypes can sometimes be answered by considering whether the behavior or trait at issue would have been viewed more or less favorably if the employee were of a different sex. *See Back,* 365 F.3d at 120 n.10 (quoting *Doe ex rel. Doe v. City of Belleville,* 119 F.3d 563, 581-82 (7th Cir. 1997)).[19]

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

Terveer v. Billington, 34 F.Supp.3d 100, 116 (D.D.C. 2014); *Heller v. Columbia Edgewater Country Club,* 195 F.Supp.2d 1212, 1224 (D. Or. 2002).[21]

This conclusion is further reinforced by the unworkability of *Simonton* and Dawson's holding that sexual orientation discrimination is not a product of sex stereotypes. Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination. *See generally* *Hively v. Ivy Tech Cmty. Coll., S. Bend,* 830 F.3d 698, 705-09 (7th Cir. 2016) (panel op.) (collecting cases), *vacated by* *Hively,* 853 F.3d 339 (en banc). Under this approach "a woman might have a Title VII claim if she was harassed or fired for being perceived as too `macho' but not if she was harassed or fired for being perceived as a lesbian." *Fabian v. Hosp. of Cent. Conn.,* 172 F.Supp.3d 509, 524 n.8 (D. Conn. 2016). In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as "ass wipe," "fag," "gay," "queer," "real man," and "fem" to determine whether discrimination is based on sex or sexual orientation. *See, e.g.,* *Kay v. Indep. Blue Cross,* 142 Fed.Appx. 48, 51 (3d Cir. 2005). Claims of gender discrimination have been "especially difficult for gay plaintiffs to bring," *Maroney v. Waterbury Hosp.,* No. 3:10-CV-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011), because references to a plaintiff's sexual orientation are generally excluded from the evidence, *Boutillier,* 221 F.Supp.3d at 269, or permitted only when "the harassment consists of homophobic slurs directed at a *heterosexual,*" *Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.,* 169 F.Supp.3d 320, 332-33 (N.D.N.Y. 2016) (emphasis added). *But see* *Franchina,* 881 F.3d at 53 (holding that jury may consider evidence referencing plaintiff's sexual orientation for purposes of a sex discrimination claim). Unsurprisingly, many courts have found these distinctions unworkable, admitting that the doctrine is "illogical," *Philpott v. New York,* 252 F.Supp.3d 313, 316 (S.D.N.Y. 2017), and produces "untenable results," *Boutillier,* 221 F.Supp.3d at 270. In the face of this pervasive confusion, we are persuaded that "the line between sex discrimination and sexual orientation discrimination is `difficult to draw' because that line does not exist save as a lingering and faulty judicial construct." *Videckis,* 150 F.Supp.3d at 1159 (quoting *Prowel,* 579 F.3d at 291). We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

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

To be clear, our conclusion that moral beliefs regarding sexual orientation are based on sex does not presuppose that those beliefs are necessarily animated by an invidious or evil motive. For purposes of Title VII, any belief that depends, even in part, on sex, is an impermissible basis for employment decisions.[22] This is true irrespective of whether the belief is grounded in fact, as in *Manhart, id.* at 704-05, 711, 98 S.Ct. 1370, or lacks "a malevolent motive," *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v. Johnson Controls, Inc.,* 499 U.S. 187, 199, 111 S.Ct. 1196, 113 L.Ed.2d 158 (1991). Indeed, in *Johnson Controls,* the Supreme Court concluded that an employer violated Title VII by excluding fertile women from jobs that involved exposure to high levels of lead, which can adversely affect the development of a fetus. 499 U.S. at 190, 200, 111 S.Ct. 1196. As the Court emphasized, "[t]he beneficence of an employer's purpose does not undermine the conclusion that an explicit gender-based policy is sex discrimination" under Title VII. *Id.* at 200, 111 S.Ct. 1196. Here, because sexual orientation is a function of sex, beliefs about sexual orientation, including moral ones, are, in some measure, "because of ... sex."

The government responds that, even if discrimination based on sexual orientation reflects a sex stereotype, it is not barred by *Price Waterhouse* because it treats women no worse than men.[23] Gov. Br. at 19-20. We believe the government has it backwards. *Price Waterhouse,* read in conjunction with *Oncale,* stands for the proposition that employers may not discriminate against women or men who fail to conform to conventional gender norms. *See Oncale,* 523 U.S. at 78, 118 S.Ct. 998 (holding that Title VII "protects men as well as women"); *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775 ("We are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group."). It follows that the employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right. To the contrary, this claim would merely be an admission that the employer has doubly violated Title VII by using gender stereotypes to discriminate against both men and women. By the same token, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women.[24]

3. Associational Discrimination

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

This Court recognized associational discrimination as a violation of Title VII in *Holcomb v. Iona College,* 521 F.3d 130, 139 (2d Cir. 2008), a case involving allegations of racial discrimination. Holcomb, a white man, alleged that he was fired from his job as the assistant coach of a college basketball team because his employer disapproved of his marriage to a black woman. This Court

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

Applying similar reasoning, the Fifth, Sixth, and Eleventh Circuits have reached the same conclusion in racial discrimination cases. *See Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.,* 173 F.3d 988, 994-95 (6th Cir. 1999) (holding that plaintiff had alleged discrimination where the employer was "charged with reacting adversely to [plaintiff] because of [his] race in relation to the race of his daughter"); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.,* 156 F.3d 581, 589 (5th Cir. 1998) ("[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person."), *vacated in part on other grounds by Williams v. Wal-Mart Stores, Inc.,* 182 F.3d 333 (5th Cir. 1999) (en banc); *Parr v. Woodmen of the World Life Ins. Co.,* 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."). Other circuits have indicated that associational discrimination extends beyond race to all of Title VII's protected classes. *See Hively,* 853 F.3d at 349 (majority) (holding that Title VII prohibits associational discrimination on the basis of race as well as color, national origin, religion, and sex); *Barrett v. Whirlpool Corp.,* 556 F.3d 502, 512 (6th Cir. 2009) (stating, in the context of a race discrimination case, that "Title VII protects individuals who, though not members of a *protected class,* are victims of discriminatory animus toward protected third persons with whom the individuals associate" (internal quotation marks omitted) (emphasis added)).[25] We agree and we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.

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

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

In this scenario, it is no defense that an employer requires both men and women to refrain from same-sex attraction or relationships. In *Holcomb,* for example, the white plaintiff was fired for his marriage to a black woman. *See* 521 F.3d at 138. If the facts of *Holcomb* had also involved a black employee fired for his marriage to a white woman, would we have said that because both the white employee and black employee were fired for their marriages to people of different races, there was no discrimination "because of... race"? Of course not.[27] It is unthinkable that "tak[ing] action against an employee because of the employee's association with a person of another race," *id.* at 139, would be excused because two employees of different races were both victims of an anti-miscegenation workplace policy. The same is true of discrimination based on sexual orientation.[28]

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

Certain *amici* supporting the defendants disagree, arguing that applying *Holcomb* and *Loving* to same-sex relationships is not warranted because anti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism. Although these *amici* offer no empirical support for this contention, *amici* supporting Zarda cite research suggesting that sexual orientation discrimination has deep misogynistic roots. *See, e.g.,* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination,* 69 N.Y.U. L. Rev. 197 (1994). But the Court need not resolve this dispute because the *amici* supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is

limited to discrimination motivated by what would colloquially be described as sexism. To the contrary, this approach is squarely foreclosed by the Supreme Court's precedents. In *Oncale,* the Court explicitly rejected the argument that Title VII did not protect male employees from sexual harassment by male co-workers, holding that "Title VII's prohibition on discrimination `because of ... sex' protects men as well as women" and extends to instances where the "plaintiff and the defendant ... are of the same sex." 523 U.S. at 78-79, 118 S.Ct. 998. This male-on-male harassment is well-outside the bounds of what is traditionally conceptualized as sexism. Similarly, as we have discussed, in *Manhart* the Court invalidated a pension scheme that required female employees to contribute more than their male counterparts because women generally live longer than men. 435 U.S. at 711, 98 S.Ct. 1370. Again, the Court reached this conclusion notwithstanding the fact that some people might not describe this policy as sexist. By extension, even if sexual orientation discrimination does not evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination "because of... sex."[29]

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

More fundamentally, *amici*'s argument is an inaccurate characterization of associational discrimination. First, the source of the Title VII claim is not the employee's associational act but rather the employer's discrimination, which is motivated by "disapprov[al] of [a particular type of] association." *See Holcomb,* 521 F.3d at 139; *see also* 42 U.S.C. § 2000e-2(m) (asking whether the protected trait was "a motivating factor"). In addition, as it pertains to the employee, what is protected is not the employee's act but rather the employee's protected characteristic,

which is a status. *Holcomb,* 521 F.3d at 139; *Univ. of Tex. Sw. Med. Ctr. v. Nassar,* 570 U.S. 338, 133 S.Ct. 2517, 2522, 186 L.Ed.2d 503 (2013) (defining "status-based discrimination," which is "prohibited by Title VII," as "discrimination on the basis of race, color, religion, sex, or national origin"). Accordingly, associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action. *See* 42 U.S.C. § 2000e-2(m).[30]

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

C. Subsequent Legislative Developments

Although the conclusion that sexual orientation discrimination is a subset of sex discrimination follows naturally from existing Title VII doctrine, the *amici* supporting the defendants place substantial weight on subsequent legislative developments that they argue militate against interpreting "because of ... sex" to include sexual orientation discrimination.[31] Having carefully considered each of *amici*'s arguments, we find them unpersuasive.

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

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

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

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

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

Drawing on the dissent in *Hively,* the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly

prohibited sexual orientation discrimination in certain statutes but not Title VII. *See* 853 F.3d at 363-64 (Sykes, *J.,* dissenting). While it is true that Congress has sometimes used the terms "sex" and "sexual orientation" separately, this observation is entitled to minimal weight in the context of Title VII.

The presumptions that terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in "the same act." *See Envtl. Def. v. Duke Energy Corp.,* 549 U.S. 561, 574, 127 S.Ct. 1423, 167 L.Ed.2d 295 (2007). By contrast, when drafting separate statutes, Congress is far less likely to use terms consistently, *see* Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside — An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I,* 65 Stan. L. Rev. 901, 936 (2013), and these presumptions are entitled to less force where, as here, the government points to terms used in different statutes passed by different Congresses in different decades. *See* Violence Against Women Reauthorization Act of 2013, Pub L. No. 113-4, § 3(b)(4), 127 Stat. 54, 61 (2013); Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 5306(a)(3), 124 Stat. 119, 626 (2010); Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, §§ 4704(a)(1)(C), § 4704(a), 123 Stat. 2835, 2837, 2839 (2009); Higher Education Amendments of 1998, Pub. L. No. 105-244, § 486(e)(1)(A), 112 Stat. 1581, 1743 (1998).

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

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

III. Summary

Since 1964, the legal framework for evaluating Title VII claims has evolved substantially.[33] Under *Manhart,* traits that operate as a proxy for sex are an impermissible basis for disparate treatment of men and women. Under *Price Waterhouse,* discrimination on the basis of sex stereotypes is prohibited. Under *Holcomb,* building on *Loving,* it is unlawful to discriminate on the basis of an employee's association with persons of another race. Applying these precedents to sexual orientation discrimination, it is clear that there is "no justification in the statutory language... for a categorical rule excluding" such claims from the reach of Title VII. *Oncale,* 523 U.S. at 80, 118 S.Ct. 998; *see also Baldwin,* 2015 WL 4397641, at *9 ("Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay, or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included.").

Title VII's prohibition on sex discrimination applies to any practice in which sex is a motivating factor. 42 U.S.C. § 2000e-2(m). As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is *defined* by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation discrimination is a form of sex discrimination.

Although sexual orientation discrimination is "assuredly not the principal evil that Congress was concerned with when it enacted Title VII," "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale,* 523 U.S. at 80, 118 S.Ct. 998. In the context of Title VII, the statutory prohibition extends to all discrimination "because of ... sex" and sexual orientation discrimination is an actionable subset of sex discrimination. We overturn our prior precedents to the contrary to the extent they conflict with this ruling. *See Simonton,* 232 F.3d at 35; *Dawson,* 398 F.3d at 218-20.

*** * ***

Zarda has alleged that, by "honestly referr[ing] to his sexual orientation," he failed to "conform to the straight male macho stereotype." J.A. 72. For this reason, he has alleged a claim of discrimination of the kind we now hold cognizable under Title VII. The district court held that there was sufficient evidence of sexual orientation discrimination to survive summary judgment on Zarda's state law claims. Even though Zarda lost his state sexual orientation discrimination claim at trial, that result does not preclude him from prevailing on his federal claim because his state law claim was tried under "a higher standard of causation than required by Title VII." *Zarda,* 855 F.3d at 81. Thus, we hold that Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation.

CONCLUSION

Based on the foregoing, we VACATE the district court's judgment on the Title VII claim and REMAND for further proceedings consistent with this opinion. We AFFIRM the judgment of the district court in all other respects.

Dennis Jacobs, Circuit Judge, concurring:

I concur in Parts I and II.B.3 of the opinion of the Court (Associational Discrimination) and I therefore concur in the result. Mr. Zarda does have a sex discrimination claim under Title VII based on the allegation that he was fired because he was a man who had an intimate relationship with another man. I write separately because, of the several justifications advanced in that opinion, I am persuaded by one; and as to associational discrimination, the opinion of the Court

says somewhat more than is necessary to justify it. Since a single justification is sufficient to support the result, I start with associational discrimination, and very briefly explain thereafter why the other grounds leave me unconvinced.

I

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

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

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

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

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

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

This outcome is easy to analogize to Loving v. Virginia, 388 U.S. 1, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). While *Loving* was an Equal Protection challenge to Virginia's miscegenation law,

the law was held unconstitutional because it impermissibly drew distinctions according to race. Id. at 10-11, 87 S.Ct. 1817. In the context of a person consorting with a person of the same sex, the distinction is similarly drawn according to sex, and is therefore unlawful under Title VII.

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

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

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

II

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

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

III

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

IV

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

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

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

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

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

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

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

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

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

We decide this appeal in the context of something of a revolution[1] in American law respecting gender and sex. It appears to reflect, *inter alia,* many Americans' evolving regard for and social acceptance of gay and lesbian persons. We are now called upon to address questions dealing directly with sex, sexual behavior, and sexual taboos, a discussion fraught with moral, religious, political, psychological, and other highly charged issues. For those reasons (among others), I think it is in the best interests of us all to tread carefully; to say no more than we must; to decide no more than is necessary to resolve this appeal. This is not for fear of offending, but for fear of the possible consequences of being mistaken in one unnecessary aspect or another of our decision.

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

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

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

I agree with the majority opinion that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words "because of... sex." The first term clearly subsumes the second, just as race subsumes ethnicity.[1] Oral Arg. Tr. at 53:5-6 (Government conceding that "ethnicity can be viewed as a subset of race"). From this central holding, the majority opinion explores the comparative approach, the stereotyping rationale, and the associational discrimination rationale to help determine "when a trait other than sex is ... a proxy for (or function of) sex." Maj. Op. at 116. But in my view, these rationales merely reflect

nonexclusive "evidentiary technique[s]," Jacobs, J., Concurring Op. at 134, frameworks, or ways to determine whether sex is a motivating factor in a given case, rather than interpretive tools that apply necessarily across all Title VII cases. Zarda himself has described these three rationales as "evidentiary theories" or "routes." Oral Arg. Tr. at 4:17-18. On this understanding, I join the majority opinion as to Parts II.A and II.B.1.a, which reflect the textualist's approach, and join the remaining parts of the opinion only insofar as they can be said to apply to Zarda's particular case.

A word about the dissents. My dissenting colleagues focus on what they variously describe as the "ordinary, contemporary, common meaning" of the words "because of ... sex," Lynch, J., Dissenting Op. at 144 n.8; Livingston, J., Dissenting Op. at 167, or the "public meaning of [those] words adopted by Congress in light of the social problem it was addressing when it chose those words," Lynch, J., Dissenting Op. at 162. There are at least two problems with this position. First, as the majority opinion points out, cabining the words in this way makes little or no sense of *Oncale* or, for that matter, *Price Waterhouse*. See Maj. Op. at 113-14. Second, their hunt for the "contemporary" "public" meaning of the statute in this case seems to me little more than a roundabout search for legislative history. Judge Lynch's laudable call (either as a way to divine congressional intent or as an interpretive check on the plain text approach) to consider what the legislature would have decided if the issue had occurred to the legislators at the time of enactment is, unfortunately, no longer an interpretive option of first resort. Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.

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

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

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

I

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

The Civil Rights Act as a whole was primarily a product of the movement for equality for African-Americans. It grew out of the demands of that movement, and was opposed by segregationist white members of Congress who opposed racial equality. Although the bill, even before it included a prohibition against sex discrimination, went beyond race to prohibit discrimination based on religion and national origin, there is no question that it would not have

been under consideration at all but for the national effort to reckon to some degree with America's heritage of race-based slavery and government-enforced segregation.

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

Movement on the bill was slow. It was only after the March on Washington in the summer of 1963, the assassination of President Kennedy in November of that year, and President Johnson's strong support for a civil rights bill that prohibited racial discrimination in employment, that the legislation made progress in Congress. Todd. S. Purdum, *An Idea Whose Time Has Come* 111-13, 151 (2014). But the private employment discrimination provision, like other sections of the bill prohibiting racial discrimination in public accommodations and federally funded programs, was openly and bitterly opposed by a large contingent of southern members of Congress. *See* Louis Menand, *The Sex Amendment,* The New Yorker (July 21, 2014), http://www.newyorker.com/magazine/2014/07/21/sex-amendment. Its passage was by no means assured when the floor debates in the House began.

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

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

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

Nevertheless, the notion that women should be treated equally at work remained controversial. By 1964, only two states, Hawaii and Wisconsin, prohibited sex discrimination in employment. Purdum, *supra,* at 196. Although decades had passed since the Supreme Court announced in *Muller v. Oregon,* 208 U.S. 412, 28 S.Ct. 324, 52 L.Ed. 551 (1908), that laws limiting the hours that women could work did not violate the Fourteenth Amendment, but rather were an appropriate accommodation for women's fragile constitutions and more pressing maternal obligations, *id.* at 420-21, 28 S.Ct. 324, state laws "protecting" women from the rigors of the workplace remained commonplace. Purdum, *supra,* at 196; *see also Hoyt v. Florida,* 368 U.S. 57, 62, 82 S.Ct. 159, 7 L.Ed.2d 118 (1961) (upholding a law requiring women, specifically, to opt in to jury service, in part because "woman is still regarded as the center of home and family life").

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

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

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

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

In addition to criminalization, gay men and women were stigmatized as suffering from mental illness. In 1964, both the American Psychiatric Association and the American Psychological Association regrettably classified homosexuality as a mental illness or disorder. As the Supreme Court recently explained, "[f]or much of the 20th century ... homosexuality was treated as an illness. When the American Psychiatric Association published the first Diagnostic and Statistical Manual of Mental Disorders in 1952, homosexuality was classified as a mental disorder, a position adhered to until 1973." *Obergefell v. Hodges,* ___ U.S. ___, 135 S.Ct. 2584, 2596, 192 L.Ed.2d 609 (2015), citing Position Statement on Homosexuality and Civil Rights, 1973, in 131 Am. J. Psychiatry 497 (1974). It was not until two years later, in 1975, that the American Psychological Association followed suit and "adopted the same position [as the American Psychiatric Association], urging all mental health professionals to work to dispel the stigma of mental illness long associated with homosexual orientation." Brief of Am. Psychological Ass'n as *Amicus Curiae, Boy Scouts of Am. v. Dale,* 530 U.S. 640, 120 S.Ct. 2446, 2454, 147 L.Ed.2d 554 (2000), citing Am. Psychological Ass'n, *Minutes of the Annual Meeting of the Council of Representatives,* in 30 Am. Psychologist 620, 633 (1975). Because gay identity was viewed as a mental illness and was, in effect, defined by participation in a criminal act, the employment situation for openly gay Americans was bleak.

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

Civil rights and civil liberties organizations were largely silent.[3] Licata, *supra,* at 168. In an influential book about the political plight of gay people, Edward Sagarin, writing under the pseudonym Donald Webster Cory, sharply criticized the silence of the bar. Donald Webster Cory, *The Homosexual in America: A Subjective Approach* (1951). For instance, he described the response to the abusive tactics used against members of the military discharged for homosexual conduct as follows: "And who raises a voice in protest against such discrimination? No one. Where was the American Civil Liberties Union? Nowhere." *Id.* at 45. To the extent that civil rights organizations did begin to engage with gay rights during the early 1960s, they did so through the lens of sexual liberty, rather than equality, grouping the prohibition of laws against same-sex relations with prohibitions of birth control, abortion, and adultery.[4] Even by the mid-1960s, the ACLU was identified by *Newsweek* as the only group "apart from the homophile organizations" that opposed laws criminalizing homosexual acts. Leigh Ann Wheeler, *How Sex Became a Civil Liberty* 155 (2013).

Given the criminalization of same-sex relationships and arbitrary and abusive police harassment of gay and lesbian citizens, nascent gay rights organizations had more urgent concerns than private employment discrimination. As late as 1968, four years *after* the passage of Title VII, the North American Conference of Homophile Organizations proposed a "Homosexual Bill of Rights" that demanded five fundamental rights: that private consensual sex between adults not be a crime; that solicitation of sex acts not be prosecuted except on a complaint by someone other than an undercover officer; that sexual orientation not be a factor in granting security clearances, visas, or citizenship; that homosexuality not be a barrier to service in the military; and that sexual orientation not affect eligibility for employment *with federal, state, or local governments.* Licata, *supra,* at 177 (emphasis added). Those proposals, which pointedly did not include a ban on private sector employment discrimination against gays, evidently had little traction with many Americans at the time. The first state to prohibit employment discrimination on the basis of sexual orientation even in the public sector was Pennsylvania, by executive order of the governor, in 1975 — more than a decade after the Civil Rights Act had become law. James W. Button et al., *The Politics of Gay Rights at the Local and State Level,* in *The Politics of Gay Rights* 269, 272 (Craig A. Rimmerman et al. eds., 2000). It was not until 1982 that Wisconsin became the first state to ban both public and private sector discrimination based on sexual orientation. *Id.* at 273; *see also* Linda A. Mooney et al., *Understanding Social Problems* 467 (6th ed. 2009). Massachusetts followed in 1989. Button et al., *supra,* at 273. Notably, as discussed more fully below, these states did so by explicit legislative action adding "sexual orientation" to pre-existing anti-discrimination laws that already prohibited discrimination based on sex; they did not purport to "recognize" that sexual orientation discrimination was merely an aspect of already-prohibited discrimination based on sex.

In light of that history, it is perhaps needless to say that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act. If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horribles. When Representative Emanuel Celler of New York, floor manager

for the Civil Rights Bill in the House, rose to oppose Representative Smith's proposed amendment, he expressed concern that it would lead to such supposed travesties as the elimination of "protective" employment laws regulating working conditions for women, drafting women for military service, and revisions of rape and alimony laws. *See* 110 Cong. Rec. 2,577 (1964). He did not reference the prohibition of sexual orientation discrimination.[5] The idea was nowhere on the horizon.

II

I do not cite this sorry history of opposition to equality for African-Americans, women, and gay women and men, and of the biases prevailing a half-century ago, to argue that the private intentions and motivations of the members of Congress can trump the plain language or clear implications of a legislative enactment. (Still less, of course, do I endorse the views of those who opposed racial equality, ridiculed women's rights, and persecuted people for their sexual orientation.) Although Chief Judge Katzmann has observed elsewhere that judicial warnings about relying on legislative history as an interpretive aid have been overstated, *see* Robert A. Katzmann, *Judging Statutes* 35-39 (2014), I agree with him, and with my other colleagues in the majority, that the implications of legislation flatly prohibiting sex discrimination in employment, duly enacted by Congress and signed by the President, cannot be cabined by citing the private prejudices or blind spots of those members of Congress who voted for it.[6] The above history makes it obvious to me, however, that the majority misconceives the fundamental *public* meaning of the language of the Civil Rights Act. The problem sought to be remedied by adding "sex" to the prohibited bases of employment discrimination was the pervasive discrimination against women in the employment market, and the chosen remedy was to prohibit discrimination that adversely affected members of one sex or the other. By prohibiting discrimination against people based on their sex, it did not, and does not, prohibit discrimination against people because of their sexual orientation.

A

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

The words used in legislation are used for a reason. Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address. The words may indeed cut deeper than the legislators who voted for the statute fully understood or intended: as relevant here, a law aimed at producing gender equality in the workplace may require or prohibit employment practices that the legislators who voted for it did not yet understand as

obstacles to gender equality. Nevertheless, it remains a law aimed at *gender* inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice, shared not only by some of those who opposed the rights of women and African-Americans, but also by some who believed in equal rights for women and people of color.

The history I have cited is not "legislative history" narrowly conceived. It cannot be disparaged as a matter of attempts by legislators or their aides to influence future judicial interpretation — in the direction of results they could not convince a majority to support in the overt language of a statute — by announcing to largely empty chambers, or inserting into obscure corners of committee reports, explanations of the intended or unintended legal implications of a bill. Nor am I seeking to infer the unexpressed wishes of all or a majority of the hundreds of legislators who voted for a bill without addressing a particular question of interpretation. Rather, I am concerned with what principles Congress committed the country to by enacting the words it chose.[7] I contend that these principles can be illuminated by an understanding of the central public meaning of the language used in the statute at the time of its enactment.[8]

If the specifically *legislative* history of the "sex amendment" is relatively sparse in light of its adoption as a floor amendment, *see* Maj. Op. at 128 n.31, the broader *political and social* history of the prohibition of sex discrimination in employment is plain for all to read. The history of the 20th century is, among other things, a history of increasing equality of men and women. Recent events remind us of how spotty that equality remains, and how inequality persists even with respect to the basic right of women to physical security and control of their own bodies. But the trend is clear, and it is particularly emphatic in the workplace.

That history makes it equally clear that the prohibition of discrimination "based on sex" was intended to secure the rights of women to equal protection in employment. Put simply, the addition of "sex" to a bill to prohibit employers from "discriminat[ing] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion,... or national origin," 42 U.S.C. § 2000e-2(a)(1), was intended to eliminate workplace inequalities that held women back from advancing in the economy, just as the original bill aimed to protect African-Americans and other racial, national, and religious minorities from similar discrimination. The language of the Act itself would have been so understood not only by members of Congress, but by any politically engaged citizen deciding whether to urge his or her representatives to vote for it. As Judge Sykes noted in her dissent in the Seventh Circuit's encounter with the same issue we face today, citing a 1960s dictionary, "In common, ordinary usage in 1964 — and now, for that matter — the word `sex' means biologically *male* or *female*; it does not also refer to sexual orientation." *Hively,* 853 F.3d at 362-63 (Sykes, *J.,* dissenting) (emphasis in original).[9] On the verge of the adoption of historic legislation to address bigotry against African-Americans on the basis of race, women in effect stood up and said "us, too," and Congress agreed.

The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in this line. Maj. Op. at 114, 115. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts

are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. It is true that what *counts* as discrimination against members of one sex may not have been fully fleshed out in the minds of supporters of the legislation, but it is easy enough to illustrate how the language of a provision enacted to accomplish the goal of equal treatment of the sexes compels results that may not have been specifically intended by its enacters.

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

Other interpretations of the statute that may not have occurred to members of the overwhelmingly male Congress that adopted it seem equally straightforward. Perhaps it did not occur to some of those male members of Congress that sexual harassment of women in the workplace was a form of employment discrimination, or that Title VII was inconsistent with a "Mad Men" culture in the office.[10] But although a few judges were slow to recognize this point, *see, e.g., Barnes v. Train,* No. 1828-73, 1974 WL 10628, at *1 (D.D.C. Aug. 9, 1974), *rev'd sub nom. Barnes v. Costle,* 561 F.2d 983 (D.C. Cir. 1977), as soon as the issue began to arise in litigation, courts quickly recognized that for an employer to expect members of one sex to provide sexual favors as a condition of employment from which members of the other sex are exempt, or to view the only value of female employees as stemming from their sexualization, constitutes a fundamental type of discrimination in conditions of employment based on sex. *See, e.g., Barnes v. Costle,* 561 F.2d at 989 (finding that retaliation by plaintiff's supervisor when she resisted his sexual advances "was plainly based on [plaintiff's] gender").[11]

The reason why any argument to the contrary would fail is not a matter of simplistic application of a formal standard, along the lines of "well, the employer wouldn't have asked the same of a man, so it's sex discrimination." Sexual exploitation has been a principal obstacle to the equal participation of women in the workplace, and whether or not individual legislators intended to prohibit it when they cast their votes for Representative Smith's amendment, both the literal language of that amendment *and* the elimination of the social evil at which it was aimed make clear that the statute must be read to prohibit it.[12]

The same goes for other forms of "hostile environment" discrimination. The history of resistance to racial integration illustrates why. Employers forced to take down their "whites only" signs

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

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

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

But such interpretations of employment "discrimination against any individual ... based on sex" do not say anything about whether discrimination based on *other* social categories is covered by the statute. Just as Congress adopted broader language than discrimination "against women," it adopted narrower language than "discrimination based on personal characteristics or classifications unrelated to job performance." Title VII does not adopt a broad principle of equal protection in the workplace; rather, its language singles out for prohibition discrimination based on particular categories and classifications that have been used to perpetuate injustice — but not all such categories and classifications. That is not a matter of abstract justice, but of political reality. Those groups that had succeeded by 1964 in persuading a majority of the members of Congress that unfair treatment of them ought to be prohibited were included; those who had not yet achieved that political objective were not.

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

None of this, of course, is remotely to suggest that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong. But not everything that is offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal. In the context of private-sector employment, racial discrimination was just as indefensible before 1964 as it is today, but it was not illegal. Discrimination against women, as President Kennedy's commission understood, was just as unfair, and just as harmful to our economy, before Title VII prohibited it as it is now, but if Congress had not adopted Representative Smith's amendment, it would have remained legal. Employment discrimination against older workers, and against qualified individuals with disabilities, imposed unfair burdens on those categories of individuals in 1964,

yet it remained legal after the Civil Rights Act of 1964 became law, because Congress did not at that time choose to prohibit such discrimination. Congress is permitted to choose what types of social problems to attack and by which means. The majority says that "we have stated that `Title VII should be interpreted broadly to achieve equal employment opportunity,'" Maj. Op. at 111, quoting *Huntington Branch, N.A.A.C.P. v. Town of Huntington,* 844 F.2d 926, 935 (2d Cir. 1988), but of course that dictum[13] appeared in the context of a discussion of racial discrimination. Congress, in fact, did not legislate in 1964 "broadly to achieve equal employment opportunity" for *all* Americans, but instead opted to prohibit only certain categories of unfair discrimination. It did not then prohibit, and alas has not since prohibited, discrimination based on sexual orientation.

B

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

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

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

Of course, the majority does not really dispute this common-sense proposition. It does not say that "sex discrimination" in the ordinary meaning of the term is literally the same thing as "sexual orientation discrimination." Rather, the majority argues that discrimination based on sex encompasses discrimination against gay people because discrimination based on sex encompasses any distinction between the sexes that an employer might make for any reason.[14] The argument essentially reads "discriminate" to mean pretty much the same thing as "distinguish." And indeed, there are recognized English uses of "discriminate," particularly when followed with "between" or "from," that imply nothing invidious, but merely mean "to perceive, observe or note [a] difference," or "[t]o make or recognize a distinction." The Oxford English Dictionary Online, http://www.oed.com (search for "Discriminate," verb, definitions 2a and 2b). For example, a person with perfect pitch is capable of discriminating a C from a C-sharp. But in the language of civil rights, a different and stronger meaning applies, that references *invidious* distinctions: "To treat a person or group in an unjust or prejudicial manner, esp[ecially] on the grounds of race, gender, sexual orientation, etc.; frequently with *against.*" *Id.* (definition 4).

And that is indeed the sense in which Title VII uses the word: the statute prohibits such practices as "fail[ing] or refus[ing] to hire or to discharge" persons on account of their race or sex or other

protected characteristic, or "otherwise to discriminate *against* any individual" with respect to employment terms. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In other words, it is an oversimplification to treat the statute as prohibiting any distinction *between* men and women in the workplace, still less any distinction that so much as requires the employer to *know* an employee's sex in order to be applied, *cf.* Maj. Op. at 112-13; the law prohibits discriminating *against* members of one sex or the other in the workplace.

That point may have little bite in the context of racial discrimination. The different "races" are defined legally and socially, and not by actual biological or genetic differences — both Hitler's Nuremberg laws and American laws imposing slavery and segregation had to define, arbitrarily, how much ancestry of a particular type consigned persons to a disfavored category, since there is no scientific or genetic basis for distinguishing a "Jew" or a "member of the colored race" from anyone else. And since no biological factor can support any job qualification based on race, courts have taken the view that to distinguish *is,* for the most part, to discriminate against. But in the area of sex discrimination, where the groups to be treated equally do have potentially relevant biological differences, not every distinction between men and women in the workplace constitutes discrimination against one gender or the other.[15] The distinctions that were prohibited, however, in either case, are those that operate to the disadvantage of (principally) the disfavored race or sex. That is the social problem that the statute aimed to correct.

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

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

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

required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII, while one that prescribed trunks for men and a bathing suit covering the breasts for women would not.

More controversial distinctions, such as different fitness requirements for men and women applying for jobs involving physical strength, have also been upheld. In a recent case, the Fourth Circuit rejected the notion that Title VII prohibits gender-normed physical fitness benchmarks pursuant to which male FBI agent trainees must perform 30 push-ups, while female trainees need only do 14. *Bauer v. Lynch,* 812 F.3d 340, 342, 351 (4th Cir.), cert. denied, ___ U.S. ___, 137 S.Ct. 372, 196 L.Ed.2d 290 (2016). In upholding this distinction, the court noted that of "the few decisions to confront the use of gender-normed physical fitness standards in the Title VII context, none has deemed such standards to be unlawful," *id.* at 348, because courts have recognized that some physiological differences between men and women "impact their relative abilities to demonstrate the same levels of physical fitness," *id.* at 351. Thus, the court in *Bauer* recognized that to distinguish between the sexes is not always to discriminate against one or the other. Indeed, a *failure* to impose distinct fitness requirements for men and women may be found to violate Title VII, if it has a disparate impact on one sex and the employer cannot justify the requirement as a business necessity. *See Lanning v. Se. Pa. Transp. Auth. (SEPTA),* 181 F.3d 478, 494 (3d Cir. 1999) (applying Civil Rights Act of 1991 and finding that time cutoff for 1.5 mile run for officers had a disparate impact, when women had a pass rate of only 6.7%, compared to a 55.6% pass rate for men, and remanding to district court to determine whether the score represents "the minimum qualifications necessary for successful performance of the job in question"). Taken to its logical conclusion, though, the majority's interpretation of Title VII would do away with this understanding of the Act.

These examples suffice to illustrate two points relevant to the supposedly simple interpretation of sex-based discrimination relied upon by the majority. First, it is not the case that any employment practice that can only be applied by identifying an employee's sex is prohibited. Second, neither can it be the case that any discrimination that would be prohibited if race were the criterion is equally prohibited when gender is used.[16] Obviously, Title VII does not permit an employer to maintain racially segregated bathrooms, nor would it allow different-colored or different-designed bathing costumes for white and black lifeguards. Such distinctions would smack of racial subordination, and would impose degrading differences of treatment on the basis of race. Precisely the same distinctions between men and women would not.[17]

Nor does the example of "discrimination based on traits that are a function of sex, such as life expectancy," Maj. Op. at 112, help the majority's cause. Discrimination of that sort, as the majority notes, could permit gross discrimination against female employees "by using traits that are associated with sex as a proxy for sex." *Id.* at 112. That is certainly so as to "traits that are a function of sex," such as pregnancy or the capacity to become pregnant. But it is not so as to discrimination based on sexual orientation. Same-sex attraction is not "a function of sex" or "associated with sex" in the sense that life expectancy or childbearing capacity are.[18] A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against *them,* as gay people, and does not differentially disadvantage employees or applicants of either sex.[19] 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.[20]

C

That "because of ... sex" did not, and still does not, cover sexual orientation, is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination. This movement, which has now been successful in twenty-two states — including all three in our Circuit — and the District of Columbia, has proceeded by expanding the categories of prohibited discrimination in state anti-discrimination laws.[21] In none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on the basis of sexual orientation. Similarly, the Executive Branch has prohibited discrimination against gay men and lesbians in federal employment by adding "sexual orientation" to previously protected grounds. *See* Exec. Order No. 13087, 63 Fed. Reg 30,097 (May 28, 1998).[22] Finally, the same approach has been reflected in the repeated (but so far unsuccessful) introduction of bills in Congress to add "sexual orientation" to the list of prohibited grounds of employment discrimination in Title VII.[23]

The Department of Justice argues, relying on *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.,* ___ U.S. ___, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015), that Congress ratified judicial interpretations of "sex" in Title VII as excluding sexual orientation when it amended the Civil Rights Act in 1991 and failed to overrule judicial decisions holding that the sex discrimination provision of Title VII did not cover sexual orientation discrimination. *See* Brief of United States as *Amicus Curiae* 8-14. In *Inclusive Communities,* the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act ("FHA"). 135 S.Ct. at 2525. In so holding, the Court found it relevant that Congress had amended the FHA after nine Courts of Appeals had held that the FHA allowed for disparate-impact claims, and did not alter the text of the Act in a way that would make it clear that disparate-impact claims were not contemplated by the FHA. *Id.* at 2519. Furthermore, the Court found it significant that the legislative history of the FHA amendment made it clear that Congress was aware of those Court of Appeals decisions. *Id.* at 2519-20. The majority dismisses this argument because at the time of the 1991 amendment to the Civil Rights Act, only three Courts of Appeals[24] had ruled that Title VII did not cover sexual orientation, and Congress did not make clear, in the legislative history of the 1991 amendment, that it was aware of this precedent. Maj. Op. at 127-28.

In light of the clear textual and historical meaning of the sex provision that I have discussed above, I do not find it necessary to rely heavily on the more technical argument that strives to interpret the meaning of statutes by congressional actions and omissions that might be taken as ratifying Court of Appeals decisions. But I do think it is worth noting that the Supreme Court also found it relevant, in *Inclusive Communities,* that Congress had *rejected* a proposed amendment "that would have eliminated disparate-impact liability for certain zoning decisions." 135 S.Ct. at 2520. Here, while only three Courts of Appeals may have ruled on the issue by 1991, over twenty-five amendments had been proposed to add sexual orientation to Title VII between 1964 and 1991. All had been rejected. In fact, two amendments were proposed in 1991,

one in the House and one in the Senate, Civil Rights Amendments Act of 1991, S. 574, 102d Congress; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Congress, and neither of those amendments found its way into the omnibus bill that overruled other judicial interpretations of the Civil Rights Act. Moreover, in addition to the three Courts of Appeals that had ruled on the issue, the EEOC — the primary agency charged by Congress with interpreting and enforcing Title VII — had also held, by 1991, that sexual orientation discrimination fell "outside the purview of Title VII." *Dillon v. Frank,* EEOC Doc. No. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990).

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

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

This last point requires one further disclaimer. As with the social *pre*-history of Title VII, these later developments are not referenced in a dubious effort to infer the specific intentions of the members of Congress who voted for the Smith amendment in 1964, nor are they referenced to infer the specific intent of each Congress that was faced with proposed sexual orientation amendments. The point, rather, is that race, gender, and sexual orientation discrimination have been consistently perceived in the political world, and by the American population as a whole, as different practices presenting different social and political issues. At different times over the last few generations, the recognition of each as a problem to be remedied by legislation has been controversial, with the movements to define each form of discrimination as illegal developing at a different pace and for different reasons, and being opposed in each case by different coalitions for different reasons. To recognize this fact is to understand that discrimination against persons based on sex has had, in law and in politics, a meaning that is separate from that of discrimination based on sexual orientation.[25]

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

III

The majority opinion goes on to identify two other arguments in support of its holding: (1) that sexual orientation discrimination is actually "gender stereotyping" that constitutes discrimination against individuals based on their sex, and (2) that such discrimination constitutes prohibited "associational discrimination" analogous to discriminating against employees who are married to members of a different race.

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

A

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

In unpacking the majority's syllogism, it is first necessary to address what we mean by "sex stereotyping" that "violates Title VII." Invidious stereotyping of members of racial, gender, national, or religious groups is at the heart of much employment discrimination. Most employers do not entertain, let alone admit to, older forms of racialist or other discriminatory ideologies that hold that members of certain groups are inherently or genetically inferior and undeserving of

equal treatment. Much more common are assumptions, not always even conscious, that associate certain negative traits with particular groups. A perception that women, for example, are not suited to executive positions, or are less adept at the mathematical and practical skills demanded of engineers, can be a significant hindrance to women seeking such positions, even when a particular woman is demonstrably qualified, or indeed even where empirical data show that on average women perform as well as or better than men on the relevant tasks. Refusing to hire or promote someone because of that sort of gender (or racial, or ethnic, or religious) stereotyping is not a separate form of sex (or race, or ethnic, or religious) discrimination, but is precisely discrimination in hiring or promotion based on sex (or race, or ethnicity, or religion). It treats applicants or employees not as individuals but as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole. For the most part, then, the kind of stereotyping that leads to discriminatory employment decisions that violate Title VII is the assignment of traits that are negatively associated with job performance (dishonesty, laziness, greed, submissiveness) to members of a particular protected class.

Clearly, sexual orientation discrimination is not an example of that kind of sex stereotyping; an employer who disfavors a male job applicant whom he believes to be gay does not do so because the employer believes that most men are gay and therefore unsuitable. Rather, he does so because he believes that most *gay* people (whether male or female) have some quality that makes them undesirable for the position, and that because this applicant is gay, he must also possess that trait. Although that is certainly stereotyping, and invidiously so, it does not stereotype a group protected by Title VII, and is therefore not (yet) illegal.

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

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

held back because of the different but related notion that women *shouldn't be* aggressive or dominant. The latter is not an assumption about how *most* women *are,* it is a normative belief about how *all* women *should be.*

I fully accept the conclusion that that kind of discrimination is prohibited, and that it imposes different conditions of employment on men and on women. Not only does such discrimination require women to behave differently in the workplace than men, but it also actively deters women from engaging in kinds of behavior that are required for advancement to certain positions, and thus effectively bars them from such advancement. The key element here is that one sex is systematically disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination.[26]

But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. 853 F.3d at 370. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex. Rather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual. The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what *all* people ought to be or do — to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.

B

The "associational discrimination" theory is no more persuasive. That theory rests on cases involving race discrimination.[27] Many courts have found that Title VII prohibits discrimination in cases in which, as in our case of *Holcomb v. Iona College,* 521 F.3d 130 (2d Cir. 2008), a white plaintiff alleged that he was fired because he was married to a person of a different race.

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

Thus, as the Supreme Court noted in striking down Virginia's law prohibiting marriage between a white person and a person of color, the Supreme Court of Virginia had upheld the statute because Virginia defined its "legitimate" purposes as "`preserv[ing] the racial integrity of [the

state's] citizens,' and [] prevent[ing] `the corruption of blood,' `a mongrel breed of citizens,' and `the obliteration of racial pride,'" purposes the Court correctly identified and rejected as "obviously an endorsement of the doctrine of White Supremacy." *Loving v. Virginia,* 388 U.S. 1, 7, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967), quoting *Naim v. Naim,* 197 Va. 80, 87 S.E.2d 749, 756 (1955). The racist hostility to "race-mixing" extended well beyond a prohibition against interracial marriage. The beatings of "freedom riders" attempting to integrate interstate bus lines in the South in the early 1960s, inflicted on white as well as black participants in the protests, demonstrated that racial bigotry against African-Americans manifested itself in direct attacks not only on African-Americans, but also on whites who associated with African-Americans as equals. The entire system of "separate but equal" segregation in both state-owned and private facilities and places of public accommodation was designed, as Charles Black made plain in a classic deconstruction of the legal fiction of "separate but equal," to confine black people to "a position of inferiority." Charles Black, *The Lawfulness of the Segregation Decision,* 69 Yale L.J. 421, 424 (1960). Thus, the associational discrimination reflected in cases such as *Loving* and *Holcomb* was a product of bigotry against a single race by another. That discrimination is expressly prohibited in employment by Title VII.

Workplace equality for racial minorities is thus blatantly incompatible with a practice that ostracizes, demeans, or inflicts adverse conditions on white employees for marrying, dating, or otherwise associating with, people of color. The prohibition of that kind of discrimination is not simply a matter of noting that, in order to effectuate it, the employer must identify the races of the employee and the person(s) with whom he or she associates. Just as sexual harassment against female employees presents a serious obstacle to the full and equal participation of women in the workplace, discrimination against members of a favored race who so much as associate with persons of another race reflects a deep-seated bigotry against the disfavored race(s) that Title VII undertakes to banish from the workplace. The principle was well stated by the Sixth Circuit in a case cited by the majority, *Barrett v. Whirlpool Corporation:*

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

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

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

with whom the [employee] associate[d]." 556 F.3d at 512 (internal quotation marks and alterations omitted).[29]

It is more difficult to imagine realistic hypotheticals in which an employer discriminated against anyone who so much as associated with men or with women, though I suppose academic examples of such behavior could be conjured. But whatever such a case might look like, discrimination against gay people is not it. Discrimination against gay men, for example, plainly is not rooted in animus toward "protected third persons with whom [they] associate." *Id.,* 556 F.3d at 512. An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and religion cases discussed above, against a "protected group" to which the employee's associates belong, but against an (alas) *unprotected* group to which they belong: other gay men.[30]

The majority tries to rebut this straightforward distinction in various ways. First, it notes — but declines to rely on — academic "research suggesting that sexual orientation discrimination has deep misogynistic roots." Maj. Op. at 126. It is certainly plausible to me that the "deep roots" of hostility to homosexuals are in some way related to the same sorts of beliefs about the proper roles of men and women in family life that underlie at least some employment discrimination against women. *See, e.g.,* Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination,* 69 N.Y.U. L. Rev. 197, 234 (1994) (noting that "[i]t should be clear from ordinary experience that the stigmatization of the homosexual has *something* to do with the homosexual's supposed deviance from traditional sex roles") (emphasis in original). It may also be that the "roots" of all forms of discrimination against people who are different in some way from a socially defined dominant group can be found in similar psychological processes of discomfort with change or difference, or with "authoritarian personality traits"[31] — or that there are other links among different forms of prejudice. And it can plausibly be argued that homosexual men have historically been derided because they were seen as abdicating their masculinity, and therefore the advantage they have over women. *See, e.g.,* Joseph H. Pleck, *Men's Power with Women, Other Men, and Society: A Men's Movement Analysis, in* The American Man 417, 424 (Elizabeth H. Pleck & Joseph H. Pleck eds., 1980).

But the majority is right not to go searching for such roots, whatever they might be, because legislation is not typically concerned, and Title VII manifestly is not concerned, with defining and eliminating the "deep roots" of biased attitudes. Congress legislates against concrete behavior that represents a perceived social problem. Title VII does not prohibit "misogyny" or "sexism," nor does it undertake to revise individuals' ideas (religious or secular) about how families are best structured. Rather, it prohibits overt acts: discrimination in hiring, promotion, and the terms and conditions of employment based on sex.[32] Similarly, states, like those in our Circuit, that have prohibited discrimination based on sexual orientation do not seek to eradicate disapproval of homosexual practices (whether rooted in religious belief or misogyny or some other theory, or caused by some conditioned or other visceral reaction). People may believe what they like, but they may not discriminate in employment against those whose characteristics or behaviors place them within the ambit of a protected category. Unlike those states, though, Congress has not enacted such a prohibition, and the fact that some of us believe that sexual orientation discrimination is unfair for much the same reasons that we disapprove of sex discrimination does not change that reality.

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

C

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

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

IV

The law with respect to the rights of gay people has advanced considerably since 1964. Much of that development has been by state legislation. As noted above, for example, twenty-two states now prohibit, by explicit legislative pronouncement, employment discrimination on the basis of sexual orientation. *See supra* note 21. But other advances have come by means of Supreme Court decisions interpreting the Constitution. Perhaps the most striking advance, from the vantage of the early 1960s, has been the legalization of same-sex marriage as a matter of constitutional law.[33]

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

For one thing, it is noteworthy that none of the Supreme Court's landmark constitutional decisions upholding the rights of gay Americans depend on the argument that laws disadvantaging homosexuals constitute merely a species of the denial of equal protection of the laws on the basis of gender, or attempt to assimilate discrimination against gay people to the kinds of sex discrimination that were found to violate equal protection in cases like *Frontiero v. Richardson,* 411 U.S. 677, 93 S.Ct. 1764, 36 L.Ed.2d 583 (1973), *Craig v. Boren,* 429 U.S. 190, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), and *Orr v. Orr,* 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979), in the 1970s.[34] Instead, the Court's gay rights cases were based on the guarantee of "liberty" embodied in the Fourteenth Amendment.

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

First, the entire point of the Constitution is to delimit the powers that have been granted by the people to their government. Our Constitution creates a republican form of government, in which the democratically elected representatives of the majority of the people are granted the power to set policy. But the powers of those representatives are constrained by a written text, which prevents a popular majority — both in the federal Congress and, since the Civil War Amendments, in state legislatures — from violating certain fundamental rights. As every law student reads in his or her first-year constitutional law class, "[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written." *Marbury v. Madison,* 1 Cranch 137, 176, 2 L.Ed. 60 (1803). To the extent that the courts exercise a non-democratic or counter-majoritarian power, they do so in the name of those rights. *See City of Richmond v. J.A. Croson Co.,* 488 U.S. 469, 495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting *United States v. Carolene Products,* 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) to explain that "one aspect of the judiciary's role under the Equal Protection

Clause is to protect `discrete and insular minorities' from majoritarian prejudice or indifference"). Particular exercises of that power, including the gay rights decisions of this new millennium, may be controversial, and fierce disagreements exist over the legitimacy of various methods of constitutional interpretation. And it is *not* controversial that the power to assess the constitutionality of legislation must be exercised with restraint, and with a due deference to the judgments of elected officials who themselves have taken an oath to defend the Constitution. But it has long been generally accepted that the courts have a special role to play in defending the liberties enshrined in the Constitution against encroachment even by the people's elected representatives. *See City of Boerne v. Flores,* 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (explaining that "Congress' discretion [to enact legislation] is not unlimited, however, and the courts retain the power, as they have since *Marbury v. Madison,* to determine if Congress has exceeded its authority under the Constitution").

Within the limits imposed by constitutional principles, however, the will of the majority, as expressed in legislation adopted by the people's representatives, governs. As the Supreme Court has instructed, the role of courts with respect to statutes is simply "to apply the statute as it is written — even if we think some other approach might accord with good policy." *Sandifer v. U.S. Steel Corp.,* ___ U.S. ___, 134 S.Ct. 870, 878, 187 L.Ed.2d 729 (2014), quoting *Burrage v. United States,* ___ U.S. ___, 134 S.Ct. 881, 892, 187 L.Ed.2d 715 (2014). Just last Term, a unanimous Supreme Court foreclosed judicial efforts to "update" statutes, declaring that, although "reasonable people can disagree" whether, following the passage of time, "Congress should reenter the field and alter the judgments it made in the past[,] ... the proper role of the judiciary in that process ... [is] to apply, not amend, the work of the People's representatives." *Henson v. Santander Consumer USA Inc.,* ___ U.S. ___, 137 S.Ct. 1718, 1725-26, 198 L.Ed.2d 177 (2017). In interpreting statutes, courts must not merely show deference or restraint; their obligation is to do their best to understand, in a socially and politically realistic way, what decisions the democratic branches of government have embodied in the language they voted for (and what they have not), and to interpret statutes accordingly in deciding cases.

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

Legislation, in contrast, can and often does set policy in minute detail. It does not necessarily concern itself with deep general principles. Rather, legislators are entitled to pick and choose which problems to address, and how far to go in addressing them. Within the limits of constitutional guarantees, Congress is given "wide latitude" to legislate, *City of Boerne,* 521 U.S. at 520, 117 S.Ct. 2157, but courts must struggle to define those limits by giving coherent

meaning to broad constitutional principles. The majestic guarantee of equal protection in the Fourteenth Amendment is a very different kind of pronouncement than the prohibition, in Title VII, of specific kinds of discrimination, by a specified subset of employers, based on clearly defined categories. The language of the Constitution thus allows a broader scope for interpretation.

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

Those enduring principles would not, could not, endure if they were incapable of adaptation — at times via judicial interpretation — to new social circumstances, as well as new understandings of old problems. That idea is not new. In 1910, the Supreme Court wrote, in the context of the Eighth Amendment, that "[t]ime works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions." *Weems v. United States,* 217 U.S. 349, 373, 30 S.Ct. 544, 54 L.Ed. 793 (1910). More recently, in *Obergefell,* the Court noted that "in interpreting the Equal Protection Clause, the Court has recognized that new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged." 135 S.Ct. at 2603.

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

Finally, the Constitution, as noted above, is designed, with very limited exceptions,[36] to govern the government. The commands of equal protection and respect for liberties that can only be denied by due process of law tell us how a government must behave when it regulates the people who created it. Legislation, however, generally governs the people themselves, in their relation with each other.

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

In its *amicus* submission, the EEOC quite reasonably asks whether it is just that a gay employee can be married on Sunday, and fired on Monday — discriminated against at his or her job for exercising a right that is protected by the Constitution. Brief of the Equal Employment Opportunity Commission as *Amicus Curiae* 22.[37] I would answer that it is not just. But at the same time, I recognize that the law does not prohibit every injustice. The Constitution protects the liberty of gay people to marry against deprivation by their government, but it does not promise freedom from discrimination by their fellow citizens. That is hardly a novel proposition: absent Title VII, the same injustice could have been inflicted on the *Lovings* themselves. The Constitution protected them against *governmental* discrimination, but (except for specific vestiges of slavery prohibited by the Thirteenth Amendment) only an act of Congress can prohibit one individual from discriminating against another in housing, public accommodations, and employment. It is well to remember that whether to prohibit race and sex discrimination was a controversial political question in 1964. Imposing an obligation on private employers to treat women and minorities fairly required political organizing and a political fight.

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

For these reasons, I respectfully, and regretfully, dissent.[38]

Debra Ann Livingston, Circuit Judge, dissenting:

I dissent for substantially the reasons set forth in Sections I, II, and III of Judge Lynch's opinion, and I join in those sections. I share in the commitment that all individuals in the workplace be

treated fairly, and that individuals not be subject to workplace discrimination on the basis of their sexual orientation, just as on the basis of their "race, color, religion, sex, [and] national origin." I cannot conclude, however, as the majority does, that sexual orientation discrimination is a "subset" of sex discrimination, Maj. Op. at 112-13, 114 n.10, 119, 119-20, et passim, and is therefore included among the prohibited grounds of workplace discrimination listed in Title VII.[1]

The majority's efforts founder on the simple question of how a reasonable reader, competent in the language and its use, would have understood Title VII's text when it was written — on the question of its public meaning at the time of enactment. The majority acknowledges the argument "that it is not `even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination `because of sex' also banned discrimination because of sexual orientation.'" *Id.* at 114 (citation omitted). It does not contest the point, however, but seeks merely to justify its departure from ordinary, contemporary meaning by claiming that "[e]ven if that [is] so," its approach no more departs from the ordinary meaning of words in their contemporary context than supposedly occurred when sexual harassment and hostile work environment claims were first recognized by courts. *Id.* at 114-15. But as Judge Lynch has cogently explained, that is simply not the case. Dissenting Op. at 144-47. The majority does not discover a "plain" yet hidden meaning in Title VII, sufficiently obscure as to wholly elude every appellate court, including this one, until the Seventh Circuit's decision in *Hively v. Ivy Tech Cmty. Coll. of Ind.,* 853 F.3d 339 (7th Cir. 2017) (en banc), last year. Instead, it *sub silentio* abandons our usual approach to statutory interpretation. *See, e.g., Sandifer v. U.S. Steel Corp.,* ___ U.S. ___, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014) (noting the "`fundamental canon of statutory construction' that, `unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning'" (quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979))); *Bilski v. Kappos,* 561 U.S. 593, 603, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010) (quoting *Perrin* and applying the same canon of statutory interpretation); *Diamond v. Diehr,* 450 U.S. 175, 182, 101 S.Ct. 1048, 67 L.Ed.2d 155 (1981) (same).

Because Sections I, II, and III of Judge Lynch's dissent are sufficient to answer the statutory question that this case presents, I do not go further to address the subject of constitutional interpretation, and do not join in Section IV. I agree with Judge Lynch, however, that constitutional and statutory interpretation should not be confused: that while courts sometimes may be called upon to play a special role in defending constitutional liberties against encroachment by *government,* in statutory interpretation, courts "are not in the business of imposing on private actors new rules that have not been embodied in legislative decision." Dissenting Op. at 166. To do so chips away at the democratic and rule-of-law principles on which our system of governance is founded — the very principles we rely on to secure the legitimacy and the efficacy of our laws, including antidiscrimination legislation.[2]

The Supreme Court said unanimously, just last Term, that the proper role of the judiciary in statutory interpretation is "to apply, not amend, the work of the People's representatives," even when reasonable people might believe that "Congress should reenter the field and alter the judgments it made in the past." *Henson v. Santander Consumer USA Inc.,* ___ U.S. ___, 137

S.Ct. 1718, 1725-26, 198 L.Ed.2d 177 (2017). "[I]t is for Congress, not the courts, to write the law," *Stanard v. Olesen,* 74 S.Ct. 768, 771, 98 L.Ed. 1151 (1954), and where "Congress' ... decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them[,]" *Herb's Welding, Inc. v. Gray,* 470 U.S. 414, 427, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985) (citing *Victory Carriers, Inc v. Law,* 404 U.S. 202, 216, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971)).

This hornbook separation-of-powers principle and the reasons behind it need not be elaborated here, for both should be well known to every law student. *See The Federalist No. 47,* at 251-52 (James Madison) (Carey & McClellan eds., 2001) (quoting Montesquieu to the effect that "were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator"); *see also I.N.S. v. Chadha,* 462 U.S. 919, 951, 103 S.Ct. 2764, 77 L.Ed.2d 317 (1983) (noting that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted"). Together, they explain why judges interpreting statutes do their best to discern the ordinary, contemporary, common meaning of the statute's language. This is the law that was enacted through the democratic process, and the law we are to apply.

This approach does not always yield results that satisfy the judge charged with the task of statutory interpretation. It has not done so today. But I cannot faithfully join in the majority's opinion. I agree with Judge Lynch that when Title VII was written and, indeed, today, "bias against or disapproval of those who are sexually attracted to persons of their own sex" was and is viewed "as a distinct type of prejudice," and not as a subcategory of "discrimination against either men or women on the basis of sex." Dissenting Op. at 162. Accordingly, and agreeing with him that in interpreting an act of Congress, we must "respect the choices made by Congress about which social problems to address, and how to address them," *id.* at 166, I respectfully dissent.

Reena Raggi, Circuit Judge, dissenting:

A majority of the court today extends Title VII's prohibition of employment discrimination "because of ... sex," 42 U.S.C. § 2000e-2(a)(1), to discrimination based on sexual orientation. I respectfully dissent substantially for the reasons stated by Judge Lynch in Parts I, II, and III of his dissenting opinion and by Judge Livingston in her dissenting opinion.

[*] Judge Sack and Judge Lynch, who are senior judges, are eligible to participate in this en banc pursuant to 28 U.S.C. § 46(c)(1) and 28 U.S.C. § 294(c).

[1] Zarda died in a BASE jumping accident after the district court awarded partial summary judgment but prior to trial on the remaining claims. The executors of his estate have been substituted as plaintiffs. Zarda and the executors of his estate are referred to collectively as "Zarda" throughout this opinion.

[2] This opinion assumes *arguendo* that "sex" in Title VII "means biologically male or female," *Hively v. Ivy Tech Cmty. Coll. of Ind.,* 853 F.3d 339, 362 (7th Cir. 2017) (en banc) (Sykes, *J.,* dissenting), and uses the terms "sex" and "gender" interchangeably, as do the Supreme Court and other circuits cited herein.

[3] The First Circuit has since qualified *Higgins,* holding that a plaintiff may "bring[] sex-plus claims under Title VII where, in addition to the sex-based charge, the `plus' factor is the plaintiff's status as a gay or lesbian individual." *Franchina v. City of Providence,* 881 F.3d 32, 54 (1st Cir. 2018).

[4] This Court has squarely held that failure to present a Title VII claim to the EEOC before filing suit in federal court "is not a jurisdictional prerequisite, but only a precondition to bringing a Title VII action that can be waived by the parties or the court." *Francis v. City of New York,* 235 F.3d 763, 768 (2d Cir. 2000) (alterations and internal quotation marks omitted).

[5] The full quotation is, "I am not making this charge on the grounds that I was discriminated on the grounds of my sexual orientation. Rather, I am making this charge because, in addition to being discriminated against because of my sexual orientation, I was also discriminated against because of my gender." S.A. 3. Although inartful and perhaps even confusing, the best interpretation of this statement, read in the context of the entire charge, is that Zarda alleged that the sexual orientation discrimination he experienced was a subset of gender discrimination. Even if otherwise, the governing rule is that "[c]laims not raised in an EEOC complaint... may be brought in federal court if they are reasonably related to the claim filed with the agency." *Williams v. N.Y.C. Hous. Auth.,* 458 F.3d 67, 70 (2d Cir. 2006) (internal quotation marks omitted). A claim is considered reasonably related if the alleged conduct "would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Id.* (internal quotation marks omitted). Because Zarda's charge gave the Commission "adequate notice to investigate discrimination on both bases," it is irrelevant whether Zarda's EEOC complaint unequivocally alleged sexual orientation discrimination. *Id.* (internal quotation marks omitted).

[6] Defendants' additional argument, which is that the executors of Zarda's estate lack standing to pursue this action, is premised on the representation that the sexual orientation claim under Title VII was not raised before the district court so the estate may not now raise that claim on the deceased plaintiff's behalf. Because we find that the sexual orientation claim was properly raised, we need not address this argument.

[7] Importantly, Title VII protection does not hinge on whether sexual orientation discrimination is "synonymous with sex discrimination." *Hively,* 853 F.3d at 363 (Sykes, *J.,* dissenting). While synonyms are coextensive, sex discrimination obviously encompasses more than sexual orientation discrimination, including sexual harassment and other recognized subsets of sex discrimination.

[8] The lead dissent rejects this "linguistic argument," Lynch, *J.,* Dissenting Op. at 148 (hereinafter "Lead Dissent"), and advocates that Title VII's prohibition must be understood in the context of the prejudices and popular movements animating national politics at the time the statute was enacted, particularly concerns about the sexual exploitation of women, *id.* at 142-48. But the dissent's account does not and cannot rebut the fact that sexual orientation is a sex-dependent trait.

[9] Notably, the government concedes that "as a logical matter ... [y]ou could view sexual orientation as a subset of sex," however the government also insists that it could be "view[ed] ... as a distinct category." Oral Arg. Tr. at 53:17-20.

[10] Lest there be any doubt, this Court's holding that sexual orientation discrimination is a subset of sex discrimination encompasses discrimination based on a person's attraction to people of the opposite sex, same sex, or both.

[11] This holding is easily operationalized. A standard jury instruction in a Title VII case alleging sex discrimination informs the jury that a plaintiff has the burden of proving, by a preponderance of the evidence, that the defendant intentionally discriminated against the plaintiff because of sex, meaning that the plaintiff's sex was a motivating factor in the defendant's decision to take the alleged adverse employment action against the plaintiff. *See* 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). In a case alleging sexual orientation discrimination under Title VII, an instruction should add that "because of sex" includes actions taken because of sexual orientation.

[12] Both the Department of Justice and the EEOC have filed *amicus* briefs in this case, the former in support of defendants and the latter in support of Zarda. Because EEOC attorneys represent only the Commission, 42 U.S.C. § 2000e-4(b)(2), while the Department of Justice has litigating authority on behalf of the United States, 28 U.S.C. § 517, this opinion refers to the Department of Justice as "the government."

[13] The lead dissent trivializes the role of sex as a motivating factor by suggesting that an employer who discriminates on the basis of sexual orientation is merely "noticing" an employee's gender. Lead Dissent at 156. This argument, which implies that an employee's sexual orientation is the primary motivating factor while his or her sex is merely collateral, cannot be squared with the Supreme Court's case law. For example, in *Manhart,* the employer's argument that it was motivated by employee's life expectancy could not save its policy because, irrespective of the employer's intention or what it claimed to notice, life expectancy was a function of sex. 435 U.S. at 712-13, 98 S.Ct. 1370.

[14] Ironically, the quoted language from *Michael M.* references instances where men and women are differently situated *because of the discrimination* borne by women — the fact that they are assigned parental responsibility at the moment an infant is born, are generally paid less than men, and are excluded from positions that are necessary for subsequent promotions. 450 U.S. at 469, 101 S.Ct. 1200 (collecting cases reflecting "the special problems of women" (internal quotation marks omitted)). The Michael M. Court acknowledged that, when the sexes are not similarly situated because of discrimination, statutes may impose different standards in the interest of leveling the playing field. *Id.* However, Title VII commands equal treatment of sexes and neither the text of the statute nor *Michael M.* creates an exception permitting employers to engage in disparate treatment of men and women simply because they exhibit biological differences.

[15] As alleged, Zarda's termination was plainly an adverse employment action that is covered by Title VII. *See* 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an employer ... to discharge ... any individual because of such individual's ... sex....").

[16] Arguably this approach is consistent with the Supreme Court's analysis in *Oncale,* which, after acknowledging that male-on-male harassment can be "because of ... sex," qualified that not all remarks with "sexual content or connotations" rise to the level of discrimination. 523 U.S. at 79-80, 118 S.Ct. 998.

[17] The lead dissent argues that this conclusion is out of sync with precedents prohibiting sexual harassment and hostile work environments because, while those cases addressed particular employment "practice[s]," today's decision extends protection to "an entirely different category of people." Lead Dissent at 22. But "persons discriminated against based on sexual orientation" is no more a new category than "persons discriminated against based on gender stereotypes." In both instances, a man or woman is discriminated against based on a trait that is a function of sex and their claims fall squarely within the ambit of a well-recognized category: "persons discriminated against based on sex."

[18] One *amicus* and the lead dissent interpret dicta in *Price Waterhouse* as establishing that sex stereotyping is discriminatory only when it pertains to traits that are required for the employee's job. *See* 490 U.S. at 251, 109 S.Ct. 1775 (observing 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"). We think this narrow reading is an inaccurate statement of *Price Waterhouse,* which did not indicate that stereotyping is impermissible *only* when the stereotyped trait is required for the plaintiff's job, and it is directly contradicted by Manhart's holding that discriminating against women based on their longer life expectancy, which was certainly not an employment requirement, violated Title VII. 435 U.S. at 710-11, 98 S.Ct. 1370.

[19] In this respect, discerning whether a stereotype is based on sex is closely aligned with the comparative test articulated in *Manhart,* which can illustrate both (1) whether a trait is a function of sex and (2) whether assumptions about that trait reflect a gender stereotype.

[20] Some *amici* insist that stereotypes are mere evidence of discrimination and that stereotyping does not, by itself, constitute sex discrimination. Beyond establishing an adverse employment action, a Title VII plaintiff must always

adduce evidence that an employer discriminated "because of" a protected trait and the Court agrees that sex stereotyping is legally relevant as "evidence that gender played a part" in a particular employment decision. *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775 (emphasis omitted). But, *Price Waterhouse*'s reference to the evidentiary value of stereotyping in no way undercuts it conclusion that an employer may not "evaluate employees by assuming or insisting that they match[] the stereotype associated with their group." *Id.* And, just as the Supreme Court concluded that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," *id.* at 250, 109 S.Ct. 1775, this Court concludes that an employer who acts on the basis of a belief that an employee cannot or should not have a particular sexual orientation has acted on the basis of sex.

[21] The Sixth Circuit has expressed the same observation, albeit in a decision declining to apply *Price Waterhouse* to sexual orientation discrimination. *See Vickers v. Fairfield Med. Ctr.,* 453 F.3d 757, 764 (6th Cir. 2006) ("[A]ll homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.").

[22] We express no view on whether some exception, either under a different provision of Title VII or under the Religious Freedom Restoration Act, might immunize from liability discriminatory conduct rooted in religious beliefs.

[23] The lead dissent offers a variation on this argument, reasoning that prescriptive views about sexual orientation rest not on "a belief about what men or women ought to be or do," but "a belief about what *all* people ought to be or do," Lead Dissent at 158, which is to say, a belief that all people should be attracted to the opposite sex. *See also Hively,* 853 F.3d at 370 (Sykes, *J.,* dissenting) ("To put the matter plainly, heterosexuality is not a female stereotype; it is not a male stereotype; it is not a sex-specific stereotype at all."). It invokes the same idea when it contends that sexual orientation discrimination is not a function of sex because it "does not differentially disadvantage employees or applicants of either sex." Lead Dissent at 152. We think the dissent goes astray by getting off on the wrong foot. The dissent views the "key element" as whether "one sex is systematically disadvantaged in a particular workplace." *Id.* at 158. But Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* ... sex." *See* 42 U.S.C. § 2000e-2(a)(1) (emphasis added); *see also Manhart,* 435 U.S. at 708, 98 S.Ct. 1370 ("The statute's focus on the individual is unambiguous."). Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex. And this means that a man and a woman are both entitled to protection from the same type of discrimination, provided that in each instance the discrimination is "because of such individual's ... sex." As we have endeavored to explain, sexual orientation discrimination is because of sex.

[24] The *Hively* dissent also argued that sexual orientation discrimination is not a form of sex discrimination because it does not discriminate comprehensively *within* a sex. In particular, the dissent suggested that in cases where a fired lesbian employee was replaced by a heterosexual woman a jury would not be able to understand that sexual orientation discrimination is a subset of sex discrimination. *See* 853 F.3d at 373. We think that jurors are capable of understanding that an employer might discriminate against some members of a sex but not others. To wit, the intuitive principle that "Title VII does not permit the victim of [discrimination] to be told that he [or she] has not been wronged because other persons of his or her race or sex were hired" is well established in the law. *Connecticut v. Teal,* 457 U.S. 440, 455, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). By way of illustration, had the plaintiff in *Price Waterhouse* been denied a promotion while a gender-conforming woman was made a partner, this would have strengthened rather than weakened the plaintiff's case that she was discriminated against for failing to conform to sex stereotypes. We see no more difficulty with the concept that an employer cannot discriminate on the basis of sexual orientation than with the concept that one cannot discriminate based on an employee's gender non-conformity.

[25] In addition, numerous district courts throughout the country have recognized that employers violate Title VII when they discriminate against employees on the basis of association with people of another national origin or sex, not only with people of another race. *See, e.g., Montes v. Cicero Pub. Sch. Dist. No. 99,* 141 F.Supp.3d 885, 900 (N.D. Ill. 2015) (national origin); *Morales v. NYS Dep't of Labor,* 865 F.Supp.2d 220, 242-43 (N.D.N.Y. 2012), *aff'd,* 530 Fed.Appx. 13 (2d Cir. 2013) (summary order) (race and national origin); *Kauffman v. Maxim Healthcare*

Servs., Inc., No. 04-CV-2869, 2006 WL 1983196, at *4 (E.D.N.Y. July 13, 2006) (sex and race); *Reiter v. Ctr. Consol. Sch. Dist. No. 26-JT,* 618 F.Supp. 1458, 1460 (D. Colo. 1985) (race and national origin).

[26] The only exception, not relevant here, is for a "bona fide occupational qualification," which permits some differential treatment based on religion, sex, or national origin, but not based on race. 42 U.S.C. § 2000e-2(e).

[27] Indeed, if this were the case, the white employee *and* the black employee would have cognizable Title VII claims. *Cf. Hively,* 853 F.3d at 359 n.2 (Flaum, *J.,* concurring) (noting that "even if an employer allegedly discriminates against all homosexual employees," the "employer's discrimination across sexes does not demonstrate that sex is irrelevant, but rather that *each individual* has a plausible sex-based discrimination claim" (emphasis added)).

[28] The lead dissent seeks to distinguish *Holcomb* by arguing that the employer in *Holcomb* was prejudiced against black people, whereas here the employer is "hostile to gay men, not men in general." Lead Dissent at 160. But, this distorts the comparison by misattributing the prejudice at issue in *Holcomb.* The basis of the Title VII claim in *Holcomb* was not the race of the plaintiff's wife; rather, the plaintiff, who was white, "suffer[ed] discrimination because of his *own* race" as a result of the employer's "disapprov[al] of interracial association." 521 F.3d at 139. Accordingly, the prejudice was not against all black people (or all white people) but against people marrying persons of a different race. That maps squarely onto this case where the prejudice is not against all men, but people being attracted to persons of the same sex.

[29] To the extent that *amici* are arguing that racism and sexism are necessary elements of a Title VII claim because these beliefs are invidious or malicious, we think their contentions are misguided. Malice, which the Supreme Court has described as an "evil motive," is not required by Title VII, *Kolstad v. Am. Dental Ass'n,* 527 U.S. 526, 530, 119 S.Ct. 2118, 144 L.Ed.2d 494 (1999); to the contrary, it is merely a basis on which an aggrieved employee may seek punitive damages, *see* 42 U.S.C. § 1981a(b)(1).

[30] Because associational discrimination is premised on the employer's motivation and an employee's status, an associational discrimination claim does not require an act that consummates an association. For example, consider a scenario in which Holcomb had not been married to a black woman but merely expressed an interest in dating black women. If the employer terminated Holcomb merely on the basis of his desire to date black women, this would still be an instance "where an employee is subjected to adverse action because an employer disapproves of interracial association," and "the employee suffers discrimination because of the employee's *own* race." *Holcomb,* 521 F.3d at 139. The same is true in the context of sexual orientation.

[31] Because "[t]he prohibition against discrimination based on sex was added to Title VII at the last minute on the floor of the House of Representatives," we have "little legislative history to guide us in interpreting" it. *Meritor,* 477 U.S. at 63-64, 106 S.Ct. 2399.

[32] The fourth case cited by the government involved allegations of discrimination against a transgender individual, a distinct question not at issue here. *See Ulane v. E. Airlines, Inc.,* 742 F.2d 1081, 1084-87 (7th Cir. 1984). In addition, of the three cases actually on point, two predate *Price Waterhouse,* which was decided in May 1989, while the third was issued one month after *Price Waterhouse* but made no mention of it. Given that these cases did not have the opportunity to apply a relevant Supreme Court precedent, even if Congress was aware of them, there was reason for Congress to regard the weight of these cases with skepticism.

[33] We also note that there has been a sea change in the constitutional framework governing same-sex marriage. *See generally Obergefell v. Hodges,* ___ U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); *United States v. Windsor,* 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). In the wake of this transformation, the intersection of the modern constitutional framework and decades-old precedents regarding sexual orientation discrimination under Title VII created a "paradoxical legal landscape" in which a man could exercise his constitutional right to marry his same-sex partner on Saturday and "then be fired on Monday for just that act." *Hively,* 830 F.3d at 714 (majority). This decision frees this circuit's jurisprudence regarding sexual orientation from that paradox.

[1] *Cf.* 1 *Callimachus* fr. 465, at 353 (Rudolfus Pfeiffer ed., 1949) (3d century B.C.) ().

[1] Welcomed by some, denounced by others, to .

[2] I find it hard to interpret the law to prohibit associational race discrimination but not associational sex discrimination. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) ("[T]he statute on its face treats each of the enumerated categories exactly the same."). If it weren't for *Simonton,* therefore, I would think *Holcomb* stands for the proposition that "where an employee is subjected to adverse action because an employer disapproves of [a same-sex] association, the employee suffers discrimination because of the employee's *own* [sex]." *Holcomb,* 521 F.3d at 139 (emphasis in original).

[3] *Holcomb* modified this Circuit's understanding of Title VII, and represents an "intervening development in the law" that justifies reconsideration of our prior precedent. *See* Crown Coat Front Co. v. United States, 363 F.2d 407, 414 (2d Cir. 1966) (Friendly, J., concurring) (quoting Miss. River Fuel Corp. v. United States, 314 F.2d 953, 958 (Ct. Cl. 1963) (Davis, J., concurring)), *rev'd,* 386 U.S. 503, 87 S.Ct. 1177, 18 L.Ed.2d 256 (1967).

[1] In that sense, I agree with Judge Cabranes that the inquiry could end there.

[1] For example, Susan B. Anthony herself stated, in a dialogue with Frederick Douglass:

The old anti-slavery school say [*sic*] women must stand back and wait until the negroes shall be recognized. But we say, if you will not give the whole loaf of suffrage to the entire people, give it to the most intelligent first. If intelligence, justice, and morality are to have precedence in the Government, let the question of woman be brought up first and that of the negro last.

Transcript of Annual Meeting of American Equal Rights Association (1869), reprinted in *History of Woman Suffrage: 1861-1876,* 383 (Elizabeth Cady Stanton et al. eds.) (1882). During the debate over the addition of "sex" to Title VII, it was similarly argued that if sex was not added to the prohibited categories of discrimination, white women would have fewer protections than black men. As Representative Martha Griffiths, an early supporter of the amendment, warned during congressional hearings, "A vote against this amendment today by a white man is a vote against his wife, or his widow, or his daughter, or his sister." Gillian Thomas, *Because of Sex* 2 (2016). And both the civil rights and the women's movements have persistently overlooked the intersectional existence of black women and other women of color. *See* Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color,* 43 Stanford L. Rev. 1241, 1242-43 & n.3 (1991).

[2] Pauli Murray and Mary O. Eastwood, lawyers and women's rights activists, exemplified that recognition, writing:

[I]n matters of discrimination, the problems of women are not as unique as has been generally assumed. That manifestations of racial prejudice have been more brutal than the more subtle manifestations of prejudice by reason of sex in no way diminishes the force of the equally obvious fact that the rights of women and the rights of Negroes are only different phases of the fundamental and indivisible issue of human rights.

Pauli Murray & Mary O. Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII,* 34 Geo. Wash. L. Rev. 232, 235 (1965) (footnote omitted).

[3] In fact, many civil rights and women's rights organizations were reluctant to support gay rights. *See, e.g.,* Bhaskar A. Shukla, *Feminism: From Mary Wollstonecraft to Betty Friedan* 111 (2007) (describing how Betty Friedan had opposed "equating feminism with lesbianism," and is said to have coined the anti-lesbian phrase "Lavender Menace" during a 1969 National Organization for Women meeting). Similarly, some civil rights leaders were uncomfortable with according public prominence to Bayard Rustin, a gay black man, despite his formidable organizing skills. Rustin was a leading strategist of the civil rights movement, and was the chief organizer of the 1963 March on Washington. John D'Emilio, *Lost Prophet: The Life and Times of Bayard Rustin* 2-3 (2003).

Although Rustin spent most of his life fighting for civil rights for African-Americans, "[p]rejudice of another sort, still not named as such in mid century America, had curtailed his opportunities and limited his effectiveness." *Id.* at 326-27 (2003).

[4] For example, at the ACLU's Biennial Conference in 1964, in a speech tellingly titled "Civil Liberties and the War on Crime," activist lawyer Harriet Pilpel advocated a constitutionally protected right to privacy as a necessary corrective to the civil liberties abuses perpetuated by laws "relating to birth control, abortion, compulsory sterilization, prostitution, miscegenation, homosexuality, fornication and adultery." Allison Day, *Guiding* Griswold: *Reevaluating National Organizations' Role in the Connecticut Birth Control Cases,* 22 Cardozo J. L. & Gender 191, 216-18 & n.204 (2016); *see also* Samuel Walker, *In Defense of American Liberties: A History of the ACLU* 312 (1990) (crediting Pilpel's speech as the first substantive introduction of gay rights to the ACLU's agenda). Pilpel's argument was not based on equal protection, and made no claim that the criminalization of same-sex relations constituted a form of sex discrimination or gender bias.

[5] By contrast, by the early 1970s, when Congress finally got around to proposing the Equal Rights Amendment ("ERA") for ratification, gay issues were at least on the radar screen, albeit only as a talking point of opponents that was quickly disavowed by the ERA's supporters. Senator Sam Ervin, who opposed the ERA, purported to be concerned that its broad language might invalidate laws that "make homosexuality a crime or ... [require states to recognize] the right of a man to marry another man or the right of a woman to marry a woman." 118 Cong. Rec. 9,315 (1972). Senator Birch Bayh, the chief sponsor of the ERA, hastened to deny that the Amendment would have any such effect, reassuring the Senate that the ERA would require only that "if a State legislature makes a judgment that it is wrong for a man to marry a man, then it must say it is wrong for a woman to marry a woman." *Id.* at 9,331.

[6] In the years immediately following the enactment of Title VII, however, even certain prominent officials charged with enforcing it seemed to take the opposite approach, interpreting the statute, insofar as it prohibited sex discrimination, in the light of the presumed prejudices of those who adopted it. Franklin Roosevelt, Jr., the first chair of the Equal Employment Opportunity Commission, believed that the ban on sex discrimination was an inadvertent add-on, and as a result need not be enforced as strictly as the prohibition on racial discrimination. When asked, at his first press conference as head of the EEOC, "What about sex?" Roosevelt responded, "Don't get me started. I'm all for it." Thomas, *supra,* at 4. One of the agency's first executive directors, Herman Edelsberg, was no better, dismissing the provision as a "fluke" that was "conceived out of wedlock." *Id.*

[7] Despite my explicit clarity about this point, both the majority, *see* Maj. Op. at 115 (characterizing "reliance on the principal concern of our legislators" as "the centerpiece of the dissent's statutory analysis") (internal quotation marks omitted), and Judge Lohier's concurrence, *see* Lohier, *J.* Concurring Op. at 137 (characterizing this opinion as a "call... to consider what the legislature would have decided if the issue had occurred to the legislators at the time of enactment"), fail to grasp it. As the text above makes plain, I do not contend that Title VII is limited by what members of Congress who voted for it privately believed or intended to prohibit, or might have hoped it would or would not do. The question here is what "discriminate against any individual ... because of such individual's ... sex," 42 U.S.C. § 2000e-2(a)(1), as contrasted to "discriminate against any individual ... because of such individual's ... sexual orientation," meant (and continues to mean) to ordinary speakers of English. Legislation cannot sensibly be interpreted by stringing together dictionary synonyms of each word and proclaiming that, if the right example of the meaning of each is selected, the "plain meaning" of the statute leads to a particular result. No theory of interpretation, including textualism itself, is premised on such an approach. (No less a textualist than Justice Scalia recognized the point: "Adhering to the *fair meaning* of the text ... does not limit one to the hyperliteral meaning of each word in the text." Antonin Scalia and Bryan A. Garner, *Reading Law* 356 (2012) (emphasis in original).) That is because the political and social context of the words is critical to understanding what it is that the political branches of our government wrote into law. (Justice Scalia again: Because most common English words "have a number of dictionary definitions," a court should ordinarily "assume the *contextually appropriate* ordinary meaning." *Id.* at 70 (emphasis added).)

[8] As the Supreme Court has repeatedly instructed, "[i]t is a `fundamental canon of statutory construction' that, `unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.'" *Sandifer v. U.S. Steel Corp.,* ___ U.S. ___, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014), quoting *Perrin v. United States,* 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). It is worth noting, moreover, that, because legislation

is a fundamentally *political* process, the *political* context of legislation, and the way in which language is (or is *not*) used in the public debate over proposed legislation, can be useful in understanding that meaning.

[9] The majority agrees, at least "*arguendo*." Maj. Op. at 107 n.2. Issues about how to define who falls into which gender, or whether the division of humanity into two sexes or genders is oversimplified as applied to persons who identify as transgender or gender fluid or bigendered are not before us today, and neither the majority nor the plaintiffs nor their *amici* contend that gay and lesbian individuals constitute a third or fourth sex. *Cf.* *Hively,* 853 F.3d at 355 (Posner, *J.,* concurring) ("It's true that even today if asked what is the sex of plaintiff Hively one would answer that she is female or that she is a woman, not that she is a lesbian. Lesbianism denotes a form of sexual or romantic attraction; it is not a physical sex identifier like masculinity or femininity.").

[10] As we have recently been reminded, too many powerful men continue to engage in such practices. *See, e.g.,* J.M.F., *What is Sexual Harassment and How Prevalent Is It?,* The Economist (Nov. 24, 2017), https://www.economist.com/blogs/economist-explains/2017/11/economist-explains-17 (writing that "[i]n recent months myriad women have detailed the sexual harassment and assault they have experienced in ... Hollywood, Silicon Valley, politics, the media, the armed forces, [and] academia").

[11] Indeed, the overt objectification of female employees was highlighted in debates immediately following the enactment of Title VII. One industry notorious for sexualizing women was the airline industry, which hired only young, attractive women to serve as flight attendants. Stephanie Coontz, *A Strange Stirring: The Feminine Mystique and American Women at the Dawn of the 1960s* 9-10 (2011). Flight attendants were forced to retire upon marriage, or, if they did not marry, once they reached their early thirties because, as one airline official commented, "the average woman's appearance has markedly deteriorated at this age." *Id.* at 10. In 1965, responding to public (male) commentary lamenting the idea that Title VII might mean an end to the practice of hiring only female flight attendants, Representative Martha Griffiths remarked, "If you are trying to run a whorehouse in the sky, get a license." Menand, *supra.*

[12] The text of the sex provision, as well as the principle of equal treatment of both sexes makes it as obvious that the less-frequently encountered situation of sexual harassment of male employees, whether by men or by women, must also be included in Title VII's prohibitions. *See* *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (noting that under Title VII, "[m]ale as well as female employees are protected against discrimination"); *see also* *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that "nothing in Title VII necessarily bars a claim of discrimination `because of ... sex' merely because the plaintiff and the defendant ... are of the same sex").

[13] The quoted statement from *Huntington* is actually a parenthetical squib glossing a citation to *Griggs v. Duke Power Co.,* 401 U.S. 424, 429-36, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), and summarizing the import of a lengthy discussion in that seminal Supreme Court decision; *Huntington* itself concerned the Fair Housing Act, Title VIII of the Civil Rights Act of 1968, codified at 42 U.S.C. §§ 3601-3631. *Huntington,* 844 F.2d at 928.

[14] Indeed, Judge Cabranes's concurring opinion suggests that that interpretation is so obvious and straightforward that nothing more need be said on the subject, and that we can dispense with the various arguments from precedent and principle that the majority opinion makes in support of its holding. Cabranes, *J.,* Concurring Op. at 135. But that interpretation, in fact, is anything but obvious.

[15] The majority's reliance on a footnote in *Price Waterhouse* does nothing to change this fact. Maj. Op. at 123-24. The majority quotes the portion of the footnote stating that Title VII "on its face treats each of the enumerated categories exactly the same," and that the "principles ... announce[d]" by the *Price Waterhouse* Court with regard to gender "apply with equal force to discrimination based on race, religion, or national origin," to support its conclusion that the associational discrimination cases that have arisen in the context of race should also apply to associational discrimination in terms of gender. *Price Waterhouse v. Hopkins,* 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). While I explain my disagreement with this argument below, it is worth noting here why this footnote does not change the above analysis. The Court in *Price Waterhouse* did not state that every decision with regard to one enumerated group in Title VII must be applied blindly to every other group. Rather, it

emphasized that the "principles" embedded in Title VII should apply with equal force to each enumerated category. *Id.* It is those principles that have allowed courts to interpret the various prohibitions in Title VII "against the background of... the historical context from which the Act arose," *United Steelworkers of Am., AFL-CIO-CLC v. Weber,* 443 U.S. 193, 201, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), in upholding distinctions between sexes that would unquestionably be rejected if made between races. And it is the principle of equal opportunity animating Title VII that I have attempted to distill in this opinion.

[16] That of course does not mean that "discriminate against" has any different meaning as applied to "because of ... race" than it does as applied to "because of ... sex." What it means is that similar, or even identical, practices may have a different social meaning and a different economic effect when they distinguish male from female employees than when they distinguish white from black employees.

[17] Despite the Times's concerns, the Rockettes remain all female more than 50 years after Title VII became law, and the owners of franchises in the Women's National Basketball Association are likely not very worried about losing a lawsuit by men who were not allowed to try out for employment with their teams. Needless to say, dance troupes or professional sports leagues that employed only whites or blacks would be quite a different matter.

[18] To spell the point out: life expectancy, *see* Maj. Op. at 116-17, citing *L.A. Dep't of Water & Power v. Manhart,* 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), may be quite literally a mathematical "function of sex," to the extent that with knowledge of a person's sex, one can calculate his or her life expectancy, which will differ from that of a member of the opposite sex. Whatever the majority means by its assertion that "sexual orientation is a function of sex," Maj. Op. at 119, it plainly does not mean anything like that.

[19] Although empirical data are hard to come by, there appears to be nothing to suggest that rates of homosexuality differ significantly between men and women. *See, e.g.,* Gary J. Gates, *In U.S., More Adults Identifying as LGBT,* Gallup (Jan. 11, 2017), http://news.gallup.com/poll/201731/lgbt-identification-rises.aspx.

[20] Of course, discrimination against a subcategory of members of one sex is also prohibited by Title VII. An employer that hires gay men but refuses to hire lesbians, or vice versa, would thus be in violation of the statute.

[21] *See* Cal. Gov't Code § 12940 (California); Colo. Rev. Stat. § 24-34-402 (Colorado); Conn. Gen. Stat. § 46a-60 (Connecticut); Del. Code Ann. tit. 19, § 711 (Delaware); D.C. Code § 2-1402.11 (District of Columbia); Haw. Rev. Stat. § 378-2 (Hawaii); 775 Ill. Comp. Stat. 5/2-101, 102 (Illinois); Iowa Code § 216.6; Me. Rev. Stat. tit. 5, § 4571 (Maine); Md. Code Ann., State Gov't § 20-606 (Maryland); Mass. Gen. Laws ch. 151B, § 4 (Massachusetts); Minn. Stat. § 363A.08 (Minnesota); Nev. Rev. Stat. § 613.330 (Nevada); N.H. Rev. Stat. Ann. § 354-A:7 (New Hampshire); N.J. Stat. Ann. § 10:5-4 (New Jersey); N.M. Stat. Ann. § 28-1-7 (New Mexico); N.Y. Exec. Law § 296 (New York); Or. Rev. Stat. § 659A.003 (Oregon); R.I. Gen. Laws § 28-5-7 (Rhode Island); Vt. Stat. Ann. tit. 21, § 495 (Vermont); Wash. Rev. Code § 49.60.180 (Washington); Wis. Stat. § 111.321 (Wisconsin).

[22] Discrimination in federal employment on the basis of sex (as well as race, color, religion, and national origin) has been prohibited by executive order since 1969. *See* Exec. Order No. 11478, 34 Fed. Reg. 12,985 (Aug. 8, 1969). In 1998, the Clinton Administration did not argue that the prohibition of sex discrimination in that Order already banned, or henceforth would be deemed to ban, sexual orientation discrimination; rather, like the states that have prohibited such discrimination by all employers, it straightforwardly added sexual orientation to the prohibited categories. *See* Exec. Order No. 13087.

[23] *See* Civil Rights Amendments Act, H.R. 166, 94th Cong. (1975); A Bill to Prohibit Discrimination on the Basis of ... Sexual Preference, H.R. 2667, 94th Cong. (1975); Civil Rights Amendments, H.R. 5452, 94th Cong. (1975); Civil Rights Amendments, H.R. 13019, 94th Cong. (1976); Civil Rights Amendments, H.R. 451, 95th Cong. (1977); Civil Rights Amendments Act, H.R. 7775, 95th Cong. (1977); Civil Rights Amendments, H.R. 2998, 95th Cong. (1977); Civil Rights Amendments Act of 1977, H.R. 4794, 95th Cong. (1977); Civil Rights Amendments Act of 1977, H.R. 5239, 95th Cong. (1977); Civil Rights Amendments Act of 1977, H.R. 8269, 95th Cong. (1977); Civil Rights Amendments Act of 1979, H.R. 2074, 96th Cong. (1979); A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 2081, 96th Cong. (1979); Civil Rights Amendments Act of 1981, H.R. 1454,

97th Cong.; Civil Rights Amendments Act of 1981, H.R. 3371, 97th Cong.; A Bill to Prohibit Discrimination on the Basis of Sexual Orientation, S. 1708, 97th Cong. (1981); A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, 98th Cong. (1983); Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong.; Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong.; Civil Rights Amendments Act of 1985, S. 1432, 99th Cong.; Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong.; Civil Rights Amendments Act of 1987, S. 464, 100th Cong.; Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong.; Civil Rights Protection Act of 1988, S. 2109, 100th Cong.; Civil Rights Amendments Act of 1989, S. 47, 101st Cong.; Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong.; Civil Rights Amendments Act of 1991, S. 574, 102d Cong.; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong.; Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong.; Employment Nondiscrimination Act of 1994, S. 2238, 103d Cong.; Civil Rights Act of 1993, H.R. 431, 103d Cong.; Employment Non-Discrimination Act of 1994, H.R. 1430, 103d Cong.; Civil Rights Amendments Act of 1995, H.R. 382, 104th Cong.; Employment Non-Discrimination Act of 1995, S. 932, 104th Cong.; Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong.; Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong.; Employment Non-Discrimination Act of 1997, S. 869, 105th Cong.; Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong.; Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong.; Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong.; Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong.; Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong.; Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong.; Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong.; Equal Rights and Equal Dignity for Americans Act of 2003, S. 16, 108th Cong.; Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong.; Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong.; Civil Rights Amendments Act of 2005, H.R. 88, 109th Cong.; Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong.; Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong.; Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong.; Employment Non-Discrimination Act of 2009, H.R. 2981, 111th Cong.; Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong.; Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011); Employment Non-Discrimination Act of 2011, S. 811, 112th Cong.; Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong.; Employment Non-Discrimination Act of 2013, S. 815, 113th Cong.; Equality Act, H.R. 3185, 114th Cong. (2015); Equality Act, S. 1858, 114th Cong. (2015).

[24] *Williamson v. A.G. Edwards and Sons, Inc.,* 876 F.2d 69 (8th Cir. 1989); *DeSantis v. Pac. Telephone and Telegraph Co., Inc.,* 608 F.2d 327 (9th Cir. 1979); *Blum v. Gulf Oil Corp.,* 597 F.2d 936 (5th Cir. 1979).

[25] This is by no stretch of the imagination an outlier position, past or present. As the majority recognizes, until just last year, when the Seventh Circuit decided *Hively,* 853 F.3d at 340, this interpretation of the sex provision prevailed, unanimously, in federal courts of appeals nationwide. Maj. Op. at 107-08 (citing the "consensus among our sister circuits" that "because of ... sex" did not cover sexual orientation, and listing eight Court of Appeals decisions so holding). Specifically, eleven Circuit Courts, including ours, had considered the question, and all had concluded that, by its terms, Title VII does not prohibit sexual orientation discrimination. *See Higgins v. New Balance Athletic Shoe, Inc.,* 194 F.3d 252, 259 (1st Cir. 1999); *Dawson v. Bumble & Bumble,* 398 F.3d 211, 217-18 (2d Cir. 2005); *Bibby v. Phila. Coca Cola Bottling Co.,* 260 F.3d 257, 261 (3d Cir. 2001); *Wrightson v. Pizza Hut of Am., Inc.,* 99 F.3d 138, 143 (4th Cir. 1996); *Blum v. Gulf Oil Corp.,* 597 F.2d 936, 938 (5th Cir. 1979); *Kalich v. AT & T Mobility, LLC,* 679 F.3d 464, 471 (6th Cir. 2012); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.,* 224 F.3d 701, 708 (7th Cir. 2000); *Williamson v. A.G. Edwards & Sons, Inc.,* 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis,* 608 F.2d at 329-30; *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005); *Evans v. Georgia Reg'l Hosp.,* 850 F.3d 1248, 1255 (11th Cir. 2017). As noted above, the EEOC had also concluded that sexual orientation fell "outside the purview of Title VII." *Dillon,* 1990 WL 1111074, at *3. It was not until 2015 that the EEOC ruled, for the first time, that Title VII should be interpreted to cover sexual orientation, *Baldwin v. Foxx,* EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015), and its position is opposed by the Department of Justice, which also has responsibility for enforcing statutes prohibiting sex discrimination. *See* Brief of the United States as *Amicus Curiae* 1.

[26] The same type of discrimination could affect men in a job environment in which stereotypically "feminine" traits such as empathy are required. On the authority of *Price Waterhouse,* Title VII would prohibit an employer from discriminating against male social workers in hiring or promotion *either* based on a stereotypical assumption that men are in general insufficiently caring *or* because of a prejudice against men who do display such putatively feminine qualities.

[27] Other than the Seventh Circuit's decision in *Hively,* 853 F.3d at 347-49, no federal appellate court has applied this theory outside of the context of racial discrimination cases.

[28] The majority quotes this passage from *Barrett,* italicizing "protected class," in an effort to suggest that the Sixth Circuit, like the Seventh, has applied this principle to sex discrimination. Maj. Op. at 124. It has not. *Barrett* was a race discrimination case. To the extent that the formulation used could be read to extend beyond race, it is dictum. As will be made clear momentarily, it is not dictum to which I object, but it is one that, properly understood, has no application to the present case.

[29] Furthermore, the principle that prohibitions against discrimination equally protect members of the socially dominant group in situations in which they are victims of discrimination would apply the same rule to a Jewish or black employer who discriminated against Jewish or black employees who married or associated with Christians or whites.

[30] The majority twits "[c]ertain *amici*" for failing to offer "empirical support" for a comparable assertion. Maj. Op. at 126. I doubt that a fair-minded reader needs any for the proposition I have stated.

[31] Sociologists have theorized that individuals with authoritarian personalities are most likely to be prejudiced against marginalized groups because they are rigid thinkers who obey authority, see the world as black and white, and enforce strict adherence to social hierarchies. Theodor W. Adorno et al., *The Authoritarian Personality* 228 (1st ed. 1950).

[32] This is not to deny that such legislation may be supported in part by the hope that once individuals from different backgrounds have occasion to interact with one another, they will see beyond stereotypes and preconceived notions about how an entire class of people "is," and the ignorance and bigotry that initially motivated discrimination will be lessened. But any such purpose cannot warrant extending the categories of discrimination that Congress has outlawed to any other category that shares similar "roots" to prohibited practices.

[33] Both the majority, *see* Maj. Op. at 131 n.33, and Judge Sack, *see* Concurring Op. of Sack, *J.,* at 135, cite these dramatic, and to me welcome, changes in the law. But these changes, both legislative and constitutional, stem from changes in social attitudes toward gay people, not from any change in, or improved understanding of, the meaning of "sex discrimination."

[34] That is particularly noteworthy given that one of the pioneering academic assertions of a right to same-sex marriage argued that the prohibition of discrimination based on sex in the Equal Rights Amendment (then before the states for ratification) would invalidate laws prohibiting same-sex marriage. Note, *The Legality of Homosexual Marriage,* 82 Yale L.J. 573, 583-88 (1973).

[35] Scholars have noted that an exceedingly small fraction of the population could conceivably block ratification of a constitutional amendment, despite overwhelming majority support for such an amendment. *See, e.g.,* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V,* 55 U. Chi. L. Rev. 1043, 1060 (1988).

[36] A significant exception is the Thirteenth Amendment, which "[b]y its own unaided force ... abolished slavery, and established universal freedom." *Civil Rights Cases,* 109 U.S. 3, 20, 3 S.Ct. 18, 27 L.Ed. 835 (1883); *see Jones v. Alfred H. Mayer Co.,* 392 U.S. 409, 437-44, 88 S.Ct. 2186, 20 L.Ed.2d 1189 (1968) (explaining that the Amendment reaches, and authorizes Congress to reach in implementing legislation, private conduct).

[37] The majority notes the same "paradox." Maj. Op. at 131 n.33.

[38] For the record, I note that I fully agree with the majority's discussion of our jurisdiction, Maj. Op. at 109-11.

[1] In relevant part, Title VII renders it an unlawful employment practice "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1).

[2] Notably, all three states in this Circuit have prohibited workplace discrimination on the basis of sexual orientation, as have nineteen other states and the District of Columbia, all through legislation, and not judicial reinterpretation of existing prohibitions on sex discrimination. Under New York law, Zarda was thus able to present his claim that he was subject to workplace discrimination on the basis of his sexual orientation to a jury. The jury decided in favor of his former employer, Altitude Express.

884 F.3d 560 (2018)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Plaintiff-Appellant, Aimee Stephens, Intervenor, v. R.G. &. G.R. HARRIS FUNERAL HOMES, INC., Defendant-Appellee.

No. 16-2424.

United States Court of Appeals, Sixth Circuit.

Argued: October 4, 2017.
Decided and Filed: March 7, 2018.

Appeal from the United States District Court for the Eastern District of Michigan at Detroit, No. 2:14-cv-13710—Sean F. Cox, District Judge.

Before: MOORE, WHITE, and DONALD, Circuit Judges.

OPINION

KAREN NELSON MOORE, Circuit Judge.

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

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an

unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we REVERSE the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, GRANT summary judgment to the EEOC on its unlawful-termination claim, and REMAND the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Aimee Stephens, a transgender woman who was "assigned male at birth," joined the Funeral Home as an apprentice on October 1, 2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. R. 51-18 (Stephens Dep. at 49-51) (Page ID #817); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 10) (Page ID #1828). During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens. R. 51-18 (Stephens Dep. at 47) (Page ID #816); R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 15) (Page ID #1829).

The Funeral Home is a closely held for-profit corporation. R. 55 (Def.'s Statement of Facts ¶ 1) (Page ID #1683).[2] Thomas Rost ("Rost"), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. *Id.* ¶¶ 4, 8, 17 (Page ID #1684-85); R. 54-2 (Rost Aff. ¶ 2) (Page ID #1326). Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." R. 55 (Def.'s Statement of Facts ¶ 31) (Page ID #1688). To that end, the Funeral Home's website contains a mission statement that states that the Funeral Home's "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. *Id.* ¶¶ 21-22 (Page ID #1686). The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. R. 61 (Def.'s Counter Statement of Facts ¶¶ 25-27; 29-30) (Page ID #1832-34). "Employees have worn Jewish head coverings when holding a Jewish funeral service." *Id.* ¶ 31

(Page ID #1834). Although the Funeral Home places the Bible, "Daily Bread" devotionals, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures ... to avoid offending people of different religions." *Id.* ¶¶ 33-34 (Page ID #1834). Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities." *Id.* ¶¶ 37-38 (Page ID #1835).

The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. R. 55 (Def.'s Statement of Facts at ¶ 51) (Page ID #1691). The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 42, 48) (Page ID #1836-37). All told, the Funeral Home spends approximately $470 per full-time employee per year and $235 per part-time employee per year on clothing for male employees. *Id.* ¶ 55 (Page ID #1839).

Until October 2014 — after the EEOC filed this suit — the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. *Id.* ¶ 54 (Page ID #1838-39). Beginning in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from $75 for part-time employees to $150 for full-time employees. *Id.* ¶ 54 (Page ID #1838-39). Rost contends that the Funeral Home would provide suits to all funeral directors, regardless of their sex, *id.,* but it has not employed a female funeral director since Rost's grandmother ceased working for the organization around 1950, R. 54-2 (Rost Aff. ¶¶ 52, 54) (Page ID #1336-37). According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified. *Id.* ¶¶ 2, 53 (Page ID #1326, 1336).

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with "a gender identity disorder" her "entire life," and informing Rost that she has "decided to become the person that [her] mind already is." R. 51-2 (Stephens Letter at 1) (Page ID #643). The letter stated that Stephens "intend[ed] to have sex reassignment surgery," and explained that "[t]he first step [she] must take is to live and work full-time as a woman for one year." *Id.* To that end, Stephens stated that she would return from her vacation on August 26, 2013, "as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire." *Id.* After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. R. 68 (Reply to Def.'s Counter Statement of Material Facts Not in Dispute at 1) (Page ID #2122). Then, just before Stephens left for her intended vacation, Rost fired her. R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 10-11) (Page ID #1828). Rost said, "this is not going to work out," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." R. 54-15 (Stephens Dep. at 75-76) Page ID #1455; R. 63-5 (Rost Dep. at 126-27) Page ID #1974. Stephens refused. *Id.* Rost testified that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman." R. 51-3 (Rost 30(b)(6) Dep. at 135-36) (Page ID #667).

Rost avers that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if [he] were to permit one of

[the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization" or if he were to "permit one of [the Funeral Home's] male funeral directors to wear the uniform for female funeral directors while at work." R. 54-2 (Rost Aff. ¶¶ 42-43, 45) (Page ID #1334-35). In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift." *Id.* ¶¶ 43, 45 (Page ID #1334-35).

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she received from "management" for her termination was that "the public would [not] be accepting of [her] transition." R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). She further noted that throughout her "entire employment" at the Funeral Home, there were "no other female Funeral Director/Embalmers." *Id.* During the course of investigating Stephens's allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend. R. 54-24 (Memo for File at 9) (Page ID #1513).

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home "discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII" and "discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII." R. 63-4 (Determination at 1) (Page ID #1968). The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014. R. 1 (Complaint) (Page ID #1-9).

The Funeral Home moved to dismiss the EEOC's action for failure to state a claim. The district court denied the Funeral Home's motion, but it narrowed the basis upon which the EEOC could pursue its unlawful-termination claim. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 100 F.Supp.3d 594, 599, 603 (E.D. Mich. 2015). In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. *See id.* at 598-99. Nevertheless, the district court determined that the EEOC had adequately stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home's "sex- or gender-based preferences, expectations, or stereotypes." *Id.* at 599 (quoting R. 1 (Compl. ¶ 15) (Page ID #4-5)).

The parties then cross-moved for summary judgment. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d 837, 840 (E.D. Mich. 2016). With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. *Id.* at 850. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act ("RFRA") precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to

demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home." *Id.* at 862-63. Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. *Id.* The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case. *Id.* at 863. Separately, the district court held that it lacked jurisdiction to consider the EEOC's discriminatory-clothing-allowance claim because, under longstanding Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party's — in this case, Stephens's — original charge. *Id.* at 864-70. The district court entered final judgment on all counts in the Funeral Home's favor on August 18, 2016, R. 77 (J.) (Page ID #2235), and the EEOC filed a timely notice of appeal shortly thereafter, *see* R. 78 (Notice of Appeal) (Page ID #2236-37).

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case. *See* D.E. 19 (Mot. to Intervene as Plaintiff-Appellant at 5-7). The Funeral Home opposed Stephens's motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. D.E. 21 (Mem. in Opp'n at 2-11). We determined that Stephens's request was timely given that she previously "had no reason to question whether the EEOC would continue to adequately represent her interests" and granted Stephens's motion to intervene on March 27, 2017. D.E. 28-2 (Order at 2). We further determined that Stephens's intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. *Id.* Six groups of amici curiae also submitted briefing in this case.

II. DISCUSSION

A. Standard of Review

"We review a district court's grant of summary judgment de novo." *Risch v. Royal Oak Police Dep't,* 581 F.3d 383, 390 (6th Cir. 2009) (quoting *CenTra, Inc. v. Estrin,* 538 F.3d 402, 412 (6th Cir. 2008)). Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In reviewing a grant of summary judgment, "we view all facts and any inferences in the light most favorable to the nonmoving party." *Risch,* 581 F.3d at 390 (citation omitted). We also review all "legal conclusions supporting [the district court's] grant of summary judgment *de novo.*" *Doe v. Salvation Army in U.S.,* 531 F.3d 355, 357 (6th Cir. 2008) (citation omitted).

B. Unlawful Termination Claim

Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). "[A] plaintiff can establish a *prima facie* case [of unlawful discrimination] by presenting direct evidence of discriminatory

intent." *Nguyen v. City of Cleveland,* 229 F.3d 559, 563 (6th Cir. 2000) (citing *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion)). "[A] facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." *Id.* (citation omitted). Once a plaintiff establishes that "the prohibited classification played a motivating part in the [adverse] employment decision," the employer then bears the burden of proving that it would have terminated the plaintiff "even if it had not been motivated by impermissible discrimination." *Id.* (citing, *inter alia, Price Waterhouse,* 490 U.S. at 244-45, 109 S.Ct. 1775).

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 850 ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here."). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), a plurality of the Supreme Court explained that Title VII's proscription of discrimination "`*because of* ... sex' ... mean[s] that gender must be irrelevant to employment decisions." *Id.* at 240, 109 S.Ct. 1775 (emphasis in original). In enacting Title VII, the plurality reasoned, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251, 109 S.Ct. 1775 (quoting *Los Angeles Dep't of Water & Power v. Manhart,* 435 U.S. 702, 707 n.13, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978)). The *Price Waterhouse* plurality, along with two concurring Justices, therefore determined that a female employee who faced an adverse employment decision because she failed to "walk ... femininely, talk ... femininely, dress ... femininely, wear make-up, have her hair styled, [or] wear jewelry," could properly state a claim for sex discrimination under Title VII — even though she was not discriminated against for being a woman *per se,* but instead for failing to be womanly enough. *See id.* at 235, 109 S.Ct. 1775 (plurality opinion) (quoting *Hopkins v. Price Waterhouse,* 618 F.Supp. 1109, 1117 (D.D.C. 1985)); *id.* at 259, 109 S.Ct. 1775 (White, J., concurring); *id.* at 272, 109 S.Ct. 1775 (O'Connor, J., concurring).

Based on *Price Waterhouse,* we determined that "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." *Smith v. City of Salem,* 378 F.3d 566, 573 (6th Cir. 2004). And we found no "reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual." *Id.* at 575. Thus, in *Smith,* we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII, *id.* at 572, because such "discrimination would

not [have] occur[red] but for the victim's sex," *id.* at 574. As we reasoned in *Smith,* Title VII proscribes discrimination both against women who "do not wear dresses or makeup" and men who do. *Id.* Under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination." *Id.* at 575.

Here, Rost's decision to fire Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman," *see* R. 51-3 (Rost 30(b)(6) Dep. at 135-36) (Page ID #667), falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens's termination, and Rost admitted that he did not fire Stephens for any performance-related issues. *See* R. 51-3 (Rost 30(b)(6) Dep. at 109, 136) (Page ID #663, 667). We therefore agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when "the employer's reliance on stereotypes ... result[s] in disparate treatment of employees because they are either male or female." Appellee Br. at 31. According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code — as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home's male employees — because such a policy "impose[s] equal burdens on men and women," and thus does not single out an employee for disparate treatment based on that employee's sex. *Id.* at 12. In support of its position, the Funeral Home relies principally on *Jespersen v. Harrah's Operating Co.,* 444 F.3d 1104 (9th Cir. 2006) (en banc), and *Barker v. Taft Broadcasting Co.,* 549 F.2d 400 (6th Cir. 1977). *Jespersen* held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. *See* 444 F.3d at 1109-11 (holding that the plaintiff failed to demonstrate how a grooming code that required women to wear makeup and banned men from wearing makeup was a violation of Title VII because the plaintiff failed to produce evidence showing that this sex-specific makeup policy was "more burdensome for women than for men"). *Barker,* for its part, held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. *See* 549 F.2d at 401 (holding that a grooming code that established different hair-length limits for male and female employees did not violate Title VII because failure to comply with the code resulted in the same consequences for men and women). For three reasons, the Funeral Home's reliance on these cases is misplaced.

First, the central issue in *Jespersen* and Barker — whether certain sex-specific appearance requirements violate Title VII — is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex. When the Funeral Home's actions are viewed in the proper context, no reasonable jury could believe that Stephens was not "target[ed] ... for disparate treatment" and that "no sex stereotype factored into [the Funeral Home's] employment decision." *See* Appellee Br. at 19-20.

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so. *Barker* was decided before *Price Waterhouse,* and it in no way anticipated the Court's recognition that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775 (plurality) (quoting *Manhart,* 435 U.S. at 707 n.13, 98 S.Ct. 1370). Rather, according to *Barker,* "[w]hen Congress makes it unlawful for an employer to `discriminate ... on the basis of ... sex ...', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." 549 F.2d at 401-02 (quoting *Gen. Elec. Co. v. Gilbert,* 429 U.S. 125, 145, 97 S.Ct. 401, 50 L.Ed.2d 343 (1976), *superseded by statute,* Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076, 52 U.S.C. § 2000e(k), *as recognized in Shaw v. Delta Air Lines, Inc.,* 463 U.S. 85, 89, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983)). Of course, this is precisely the sentiment that *Price Waterhouse* "eviscerated" when it recognized that "Title VII's reference to `sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." *Smith,* 378 F.3d at 573 (citing *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775). Indeed, *Barker*'s incompatibility with *Price Waterhouse* may explain why this court has not cited *Barker* since *Price Waterhouse* was decided.

As for *Jespersen,* that Ninth Circuit case is irreconcilable with our decision in *Smith.* Critical to *Jespersen*'s holding was the notion that the employer's "grooming standards," which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate Title VII because they did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." 444 F.3d at 1113. We reached the exact opposite conclusion in *Smith,* as we explained that requiring women to wear makeup does, in fact, constitute improper sex stereotyping. 378 F.3d at 574 ("After *Price Waterhouse,* an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex."). And more broadly, our decision in *Smith* forecloses the *Jespersen* court's suggestion that sex stereotyping is permissible so long as the required conformity does not "impede [an employee's] ability to perform her job," *Jespersen,* 444 F.3d at 1113, as the *Smith* plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. *Jespersen*'s incompatibility with *Smith* may explain why it has never been endorsed (or even cited) by this circuit — and why it should not be followed now.

Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII *only* when "the employer's sex stereotyping resulted in `disparate treatment of men and women.'" Appellee Br. at 18 (quoting *Price Waterhouse,* 490 U.S. at 251, 109 S.Ct. 1775).[3] This interpretation of Title VII cannot be squared with our holding in *Smith.* There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on "his failure to conform to sex stereotypes concerning how a man should look and behave." *Smith,* 378 F.3d at 572. It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful

discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 123, No. 15-3775, 2018 WL 1040820 (2d Cir. Feb. 26, 2018) (en banc) (plurality) ("[T]he employer in *Price Waterhouse* could not have defended itself by claiming that it fired a gender-non-conforming man as well as a gender-non-conforming woman any more than it could persuasively argue that two wrongs make a right.").

In short, the Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress code does not itself violate Title VII — an issue that is not before this court — the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was "at least a motivating factor in the [Funeral Home's] actions," *see* White v. Columbus Metro. Hous. Auth., 429 F.3d 232, 238 (6th Cir. 2005) (quoting Jacklyn v. Schering-Plough Healthcare Prods. Sales Corp., 176 F.3d 921, 926 (6th Cir. 1999)), and because we reject the Funeral Home's affirmative defenses (*see* Section II.B.3, *infra*), we GRANT summary judgment to the EEOC on its sex discrimination claim.

2. Discrimination on the Basis of Transgender/Transitioning Status

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

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

prohibits discrimination on the basis of sexual orientation — a different question than the issue before this court — by asking whether the plaintiff, a self-described lesbian, would have been fired "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." *Id.* If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. *See id.* Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected Rost's decision to fire Stephens.

The court's analysis in *Schroer v. Billington,* 577 F.Supp.2d 293 (D.D.C. 2008), provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination `because of religion' easily encompasses discrimination because of a *change* of religion.'" *Id.* at 306 (emphasis in original). By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. *See id.* at 307-08.[4] Here, there is evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that `the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,'" and "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman."[5] *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 848 (quoting R. 55 (Def.'s Statement of Facts ¶ 28) (Page ID #1687); R. 53-3 (Rost 30(b)(6) Dep. ¶ 44) (Page ID #936)). As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her." Equality Ohio Br. at 12; *cf. Hively,* 853 F.3d at 359 (Flaum, J., concurring) (arguing discrimination against a female employee because she is a lesbian is necessarily "motivated, in part, by ... the employee's sex" because the employer is discriminating against the employee "because she is (A) a woman who is (B) sexually attracted to women").

The Funeral Home argues that *Schroer*'s analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. Appellee Br. at 30. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in *Price Waterhouse* that Title VII requires "gender [to] be irrelevant to employment decisions." 490 U.S. at 240, 109 S.Ct. 1775. Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

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

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

We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much — both by this circuit and others. In *G.G. v. Gloucester County School Board,* 654 Fed. Appx. 606 (4th Cir. 2016), for instance, the Fourth Circuit described *Smith* as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." *Id.* at 607. And in *Dodds v. United States Department of Education,* 845 F.3d 217 (6th Cir. 2016), we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed to show that it would likely succeed on the merits. *Id.* at 220-21. In so holding, we cited *Smith* as evidence that this circuit's "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior," *id.* at 221 (second quote quoting *Smith,* 378 F.3d at 575), and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," *id.* (citing *Glenn v. Brumby,* 663 F.3d 1312, 1316 (11th Cir. 2011)), and "[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes," *id.* (quoting *G.G. ex rel. Grimm v. Gloucester Cty. Sch. Bd.,* 822 F.3d 709, 729 (4th Cir.) (Davis, J., concurring), *cert. granted in part,* ___ U.S. ___, 137 S.Ct. 369, 196 L.Ed.2d 283 (2016), *and vacated and remanded,* ___ U.S. ___, 137 S.Ct. 1239, 197 L.Ed.2d 460 (2017)).[6] Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned `gender identity.'" Appellee Br. at 25-26. But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale v. Sundowner Offshore Servs., Inc.,* 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998); *see also Zarda,* 883 F.3d at 113-16 (majority opinion) (rejecting the argument that Title VII was not originally intended to protect employees against discrimination on the basis of sexual orientation, in part because the same argument "could also be said of multiple forms of discrimination that are [now] indisputably prohibited by Title VII ... [but] were initially believed to fall outside the scope of Title VII's prohibition," such as "sexual harassment and hostile work environment claims"). And in any event, *Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads "sex" to mean only individuals' "chromosomally driven physiology and reproductive function." *See* Appellee Br. at 26. Indeed, we criticized the district court in *Smith* for "relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because `Congress had a narrow view of sex in mind' and `never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" 378 F.3d at

572 (quoting *Ulane v. E. Airlines, Inc.,* 742 F.2d 1081, 1085 (7th Cir. 1984)) (alteration in original). According to *Smith,* such a limited view of Title VII's protections had been "eviscerated by *Price Waterhouse.*" *Id.* at 573, 109 S.Ct. 1775. The Funeral Home's attempt to resurrect the reasoning of these earlier cases thus runs directly counter to *Smith*'s holding.

In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. Appellee Br. at 27-28. It is true, of course, that an individual's biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in *Zarda,*

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

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

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, *see* Appellee Br. at 28, because "Congress may certainly choose to use both a belt and suspenders to achieve its objectives," *Hively,* 853 F.3d at 344; *see also Yates v. United States,* ___ U.S. ___, 135 S.Ct. 1074, 1096, 191 L.Ed.2d 64 (2015) (Kagan, J., dissenting) (noting presence of two overlapping provisions in a statute "may have reflected belt-and-suspenders caution"). We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In *In re Rodriguez,* 487 F.3d 1001 (6th Cir. 2007), for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII's prohibition on discrimination on the basis of national origin, *see id.* at 1006 n.1, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits, *see* 20 U.S.C. § 1092(f)(1)(F)(ii). Moreover, Congress's failure to modify Title VII to include expressly gender identity "lacks `persuasive significance' because `several equally tenable inferences' may be drawn from such inaction, `including the inference that the existing legislation already incorporated the offered change.'" *Pension Benefit Guar. Corp. v. LTV Corp.,* 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (quoting *United States v. Wise,* 370 U.S. 405, 411, 82

S.Ct. 1354, 8 L.Ed.2d 590 (1962)). In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in *Smith* superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual ... has alleged a claim of sex stereotyping pursuant to Title VII." *Smith v. City of Salem,* 369 F.3d 912, 922 (6th Cir.), *opinion amended and superseded,* 378 F.3d 566 (6th Cir. 2004). But such an amendment does not mean, as the Funeral Home contends, that the now-binding *Smith* opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. *See* Appellee Br. at 31. The elimination of the language, which was not necessary to the decision, simply means that *Smith* did not expressly recognize Title VII protections for transgender persons based on identity. But *Smith*'s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in *Vickers v. Fairfield Medical Center,* 453 F.3d 757 (6th Cir. 2006), precludes the holding we issue today. We held in *Vickers* that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." *Id.* at 764. *Vickers* thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to assert a successful sex stereotyping claim." *Id.* The *Vickers* court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." *Id.* (quoting *Dawson v. Bumble & Bumble,* 398 F.3d 211, 218 (2d Cir. 2005)). The Funeral Home insists that, under *Vickers,* Stephens's sex-stereotyping claim survives only to the extent that it concerns her "appearance or mannerisms on the job," *see id.* at 763, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, *Vickers* does not control this case because *Vickers* concerned a different legal question. As the EEOC and amici Equality Ohio note, *Vickers* "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." Appellant Br. at 30; *see also* Equality Ohio Br. at 16 n.7. While it is indisputable that "[a] panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling authority," *Darrah v. City of Oak Park,* 255 F.3d 301, 309 (6th Cir. 2001) (quoting *Salmi v. Sec'y of Health & Human Servs.,* 774 F.2d 685, 689 (6th Cir. 1985)), one case is not "controlling authority" over another if the two address substantially different legal issues, *cf. Int'l Ins. Co. v. Stonewall Ins. Co.,* 86 F.3d 601, 608 (6th Cir. 1996) (noting two panel decisions that "on the surface may appear contradictory" were reconcilable because "the result [in both cases wa]s heavily fact driven"). After all, we do not overrule a case by distinguishing it.

Second, we are not bound by *Vickers* to the extent that it contravenes *Smith. See Darrah,* 255 F.3d at 310 ("[W]hen a later decision of this court conflicts with one of our prior published decisions, we are still bound by the holding of the earlier case."). As noted above, *Vickers*

indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to "conform to traditional gender stereotypes *in any observable way at work.*" 453 F.3d at 764 (emphasis added). The *Vickers* court's new "observable-at-work" requirement is at odds with the holding in *Smith,* which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005) — a binding decision that predated *Vickers* by more than a year — in which we held that a reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman *outside of work* were well-known within the [workplace]." *Id.* at 738 (emphasis added).[7] From *Smith* and *Barnes,* it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The *Vickers* court's efforts to develop a narrower rule are therefore not binding in this circuit.

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

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 857-64. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court's grant of summary judgment on different grounds — namely that Stephens falls within the "ministerial exception" to Title VII and is therefore not protected under the Act. *See* Public Advocate Br. at 20-24.

We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore REVERSE the district court's grant of summary judgment in the Funeral Home's favor and GRANT summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC,* 565 U.S. 171, 188, 132 S.Ct. 694, 181 L.Ed.2d 650 (2012). "[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." *Conlon v. InterVarsity Christian Fellowship/USA,* 777 F.3d 829, 833 (6th Cir. 2015) (quoting *Hollins v. Methodist Healthcare, Inc.,* 474 F.3d 223, 225 (6th Cir. 2007)). "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which `concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.'" *Gen. Conf. Corp. of Seventh-Day Adventists v. McGill,* 617 F.3d 402, 409 (6th Cir. 2010) (quoting *Hutchison v. Thomas,* 789 F.2d 392, 396 (6th Cir. 1986)) (alteration in original).

Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Public Advocate Br. at 20-24. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Appellee Br. at 35. Although the Funeral Home has not waived the ministerial-exception defense by failing to raise it, *see Conlon,* 777 F.3d at 836 (holding that private parties may not "waive the First Amendment's ministerial exception" because "[t]his constitutional protection is... structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon,* the ministerial exception applies only to "religious institution[s]." *Id.* at 833. While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," *id.* at 834 (quoting *Hollins,* 474 F.3d at 225), to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics," *id.* at 834 (quoting *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.,* 363 F.3d 299, 310 (4th Cir. 2004)). In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission," constituted a religious organization for the purposes of the ministerial exception. *See id.* at 831, 833. IVCF described itself on its website as "faith-based religious organization" whose "purpose `is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.'" *Id.* at 831 (citation omitted). In addition, IVCF's website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." *Id.* (citation omitted). Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF's Purpose Statement and Doctrinal Basis." *Id.*

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in *Conlon,* the Funeral Home does not purport or seek to "establish and advance" Christian values. *See id.* As the EEOC notes, the Funeral Home "is not affiliated with

any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions." Appellant Reply Br. at 33-34 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 25-27, 30, 37) (Page ID #1832-35)). Though the Funeral Home's mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," R. 55 (Def.'s Statement of Facts ¶ 21) (Page ID #1686), the Funeral Home's sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish, *see* R. 51-3 (Rost 30(b)(6) Dep. at 39-40) (Page ID #652). The Funeral Home does not decorate its rooms with "religious figures" because it does not want to "offend[] people of different religions." R. 61 (Def.'s Counter Statement of Disputed Facts ¶ 33) (Page ID # 1834). The Funeral Home is open every day, including on Christian holidays. *Id.* at 88-89 (Page ID #659-60). And while the employees are paid for federally recognized holidays, Easter is not a paid holiday. *Id.* at 89 (Page ID #660).

Nor is Stephens a "ministerial employee" under *Hosanna-Tabor.* Following *Hosanna-Tabor,* we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee's title "conveys a religious — as opposed to secular — meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith" and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions ... for the religious organization." *Conlon,* 777 F.3d at 834-35. Stephens's title — "Funeral Director" — conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," *see id.* at 835; rather, Rost's description of funeral directors' work identifies mostly secular tasks — making initial contact with the deceased's families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families' "final farewell," R. 53-3 (Rost Aff. ¶¶ 14-33) (Page ID #930-35). The only responsibilities assigned to Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." *Id.* ¶ 20 (Page ID #932-33). Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon,* which "included assisting others to cultivate `intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.'" 777 F.3d at 832. In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

b. Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in *Employment Division v. Smith,* 494 U.S. 872, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990), which overruled the approach to analyzing Free

Exercise Clause claims set forth by *Sherbert v. Verner,* 374 U.S. 398, 83 S.Ct. 1790, 10 L.Ed.2d 965 (1963). *See City of Boerne v. Flores,* 521 U.S. 507, 511-15, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person — (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1. RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

We have previously made clear that "Congress intended RFRA to apply only to suits in which the government is a party." *Seventh-Day Adventists,* 617 F.3d at 410. Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. *See id.* Now that Stephens has intervened in this suit, she argues that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. Intervenor Br. at 15. The EEOC supports Stephens's argument. EEOC Reply Br. at 31.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Appellee Br. at 34. Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8); *see also* D.E. 28-2 (March 27, 2017 Order at 2), the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place," Appellee Br. at 34-35 (citing *Illinois Bell Tel. v. FCC,* 911 F.2d 776, 786 (D.C. Cir. 1990)).

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." D.E. 23 (Stephens Reply in Support of Mot. to Intervene at 8) (citing *Thomas v. Arn,* 474 U.S. 140, 148, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985)). Though the district court

noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 864 n.23, this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors... are permitted to present different arguments related to the principal parties' claims." Intervenor Reply Br. at 14 (citing *Grutter v. Bollinger,* 188 F.3d 394, 400-01 (6th Cir. 1999)). But in *Grutter,* this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." 188 F.3d at 400. Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

Moreover, we typically will not consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] ... litigation." *Pinney Dock & Transp. Co. v. Penn Cent. Corp.,* 838 F.2d 1445, 1461 (6th Cir. 1988) (citation omitted). The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim.[8]

ii. Prima Facie Case Under RFRA

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." *Gonzales v. O Centro Espírita Beneficente União do Vegetal,* 546 U.S. 418, 428, 126 S.Ct. 1211, 163 L.Ed.2d 1017 (2006). In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." *Burwell v. Hobby Lobby Stores, Inc.,* ___ U.S. ___, 134 S.Ct. 2751, 2779, 189 L.Ed.2d 675 (2014). Rather, courts must assess "whether the line drawn reflects `an honest conviction.'" *Id.* (quoting *Thomas v. Review Bd. of Ind. Emp't Sec. Div.,* 450 U.S. 707, 716, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981)). In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. § 2000cc-5(7)(A).

The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," Appellant Br. at 41, and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition would interfere with any religious `action or practice,'" *id.* at 43 (quoting *Kaemmerling v. Lappin,* 553 F.3d 669, 679 (D.C. Cir. 2008)). The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with — and thus impose a substantial burden on — [the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving." Appellee Br. at 38.

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise — even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. *See United States v. Sterling,* 75 M.J. 407, 415 (C.A.A.F. 2016) (noting that conduct that "was claimed to be religiously motivated at least in part ... falls within RFRA's expansive definition of `religious exercise'"), *cert. denied,* ___ U.S. ___, 137 S.Ct. 2212, 198 L.Ed.2d 657 (2017). The question then becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith ... would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38. Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden — that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families — is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a `man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to `hinder healing.'" Appellant Reply Br. at 19. The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. R. 54-5 (Rost 30(b)(6) Dep. at 60-61) (Page ID #1362). Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered, *see* R. 55 (Def.'s Statement of Facts ¶ 78) (Page ID #1697), at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. *See Tree of Life Christian Sch. v. City of Upper Arlington,* 823 F.3d 365, 371-72 (6th Cir. 2016) (holding that this court "cannot *assume* ... a fact" at the summary judgment stage); *see also Guess? Inc. v. United States,* 944 F.2d 855, 858 (Fed. Cir. 1991) (in case where manufacturer's eligibility for certain statutory refund on import tariffs turned on whether foreign customers preferred U.S.-made jeans more than foreign-made jeans, court held that the manufacturer's averred *belief* regarding foreign customers' preferences was not conclusive; instead, there remained a genuine dispute of material fact as to foreign customers' *actual* preferences). Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous ... to allow the preferences and prejudices of the customers to determine whether the sex

discrimination was valid." *Diaz v. Pan Am. World Airways, Inc.,* 442 F.2d 385, 389 (5th Cir. 1971); *see also Bradley v. Pizzaco of Nebraska, Inc.,* 7 F.3d 795, 799 (8th Cir. 1993) (holding grooming policy for pizza deliverymen that had disparate impact on African-American employees was not justified by customer preferences for clean-shaven deliverymen because "[t]he existence of a beard on the face of a delivery man does not affect in any manner Domino's ability to make or deliver pizzas to their customers"); *Fernandez v. Wynn Oil Co.,* 653 F.2d 1273, 1276 (9th Cir. 1981) (rejecting claim that promoting a female employee would "`destroy the essence' of [the defendant's] business" — a theory based on the premise that South American clients would not want to work with a female vice-president — because biased customer preferences did not make being a man a "bona fide occupational qualification" for the position at issue). District courts within this circuit have endorsed these out-of-circuit opinions. *See, e.g., Local 567 Am. Fed'n of State, Cty., & Mun. Emps. v. Mich. Council 25, Am. Fed'n of State, Cty., & Mun. Emps.,* 635 F.Supp. 1010, 1012 (E.D. Mich. 1986) (citing *Diaz,* 442 F.2d 385, and *Weeks v. Southern Bell Telephone & Telegraph Co.,* 408 F.2d 228 (5th Cir. 1969), for the proposition that "[a]ssertions of sex-based employee classification cannot be made on the basis of stereotypes or customer preferences").

Of course, cases like *Diaz, Fernandez,* and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez,* and we reject it here. In *Fernandez,* the Ninth Circuit held that customer preferences could not transform a person's gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. *See* 653 F.2d at 1276-77. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business — or, by association, his religious exercise.

The Funeral Home's second alleged burden also fails. Under *Holt v. Hobbs,* ___ U.S. ___, 135 S.Ct. 853, 190 L.Ed.2d 747 (2015), a government action that "puts [a religious practitioner] to th[e] choice" of "`engag[ing] in conduct that seriously violates [his] religious beliefs' [or]... fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. *See id.* at 862 (quoting *Hobby Lobby,* 134 S.Ct. at 2775). Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire *while representing* [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[] pressure... to leave the funeral industry and end his ministry to grieving people." Appellee Br. at 38-39 (emphasis in original). Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest

that the benefit is religiously compelled. *See* Appellant Br. at 49 ("[T]he EEOC's suit would require only that *if* Rost provides a clothing benefit to his male employees, he provide a comparable benefit (which could be in-kind, or in cash) to his female employees."); R. 54-2 (Rost Aff.) (Page ID 1326-37) (no suggestion that clothing benefit is religiously motivated). In this regard, Rost is unlike the employers in *Hobby Lobby,* who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. *See* 134 S.Ct. at 2776. And while "it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, *id.* at 2777, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]" — namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334-35) — constitutes "an honest conviction." *See Hobby Lobby,* 134 S.Ct. at 2779 (quoting *Thomas,* 450 U.S. at 716, 101 S.Ct. 1425). But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure — which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection — substantially burdens their religious practice. *See Eternal Word Television Network, Inc. v. Sec'y of U.S. Dep't of Health & Human Servs.,* 818 F.3d 1122, 1132-33, 1143 (11th Cir. 2016).

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. *See id.* at 1141 (collecting cases); *see also Mich. Catholic Conf. & Catholic Family Servs. v. Burwell,* 807 F.3d 738 (6th Cir. 2015), *cert. granted, judgment vacated sub nom. Mich. Catholic Conf. v. Burwell,* ___ U.S. ___, 136 S.Ct. 2450, 195 L.Ed.2d 261 (2016).[9] The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute — and not the employer's act of opting out — that "entitle[d] plan participants and beneficiaries to

contraceptive coverage." *See, e.g., Eternal Word,* 818 F.3d at 1148-49. As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice. *See id.*

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII — without actually assisting or facilitating Stephens's transition efforts — does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.,* 547 U.S. 47, 65, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006) (citing *Bd. of Ed. of Westside Cmty. Schs. (Dist. 66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)); *see also Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 841-42, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (being required to provide funds on an equal basis to religious as well as secular student publications does not constitute state university's support for students' religious messages). Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is *not* endorsing his employee's religious beliefs by employing them." Appellant Reply Br. at 18-19 (citing R. 61 (Def.'s Counter Statement of Disputed Facts ¶¶ 31, 37, 38) (Page ID #1834-36); R. 51-3 (Rost Dep. at 41-42) (Page ID #653)).[10]

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. *Cf. Eternal Word,* 818 F.3d at 1145 ("We reject a framework that takes away from courts the responsibility to decide what action the government requires and leaves that answer entirely to the religious adherent. Such a framework improperly substitutes religious belief for legal analysis regarding the operation of federal law."). Accordingly, requiring Rost to comply with Title VII's proscriptions on discrimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we REVERSE the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we GRANT summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore GRANT summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] ... the particular claimant whose sincere exercise of religion is being substantially burdened." *Gonzales,* 546 U.S. at 430-31, 126 S.Ct. 1211 (citing 42 U.S.C. § 2000bb-1(b)). This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants." *Id.* at 431, 126 S.Ct. 1211.

As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the `elimination of workplace discrimination, including sex discrimination.'" Appellee Br. at 41 (quoting Appellant Br. at 51).[11] However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this case. *Id.* According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." *Id.* The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Appellant Br. at 52, 54 (citing *Lusardi v. McHugh,* EEOC DOC XXXXXXXXXX, 2015 WL 1607756, at *1 (E.E.O.C. Apr. 1, 2015)). Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status." Intervenor Br. at 21, 23-25.

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim — that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior — the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in *Hobby Lobby,* the issue, which the Court ultimately declined to adjudicate, was whether the

government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling — not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice. *See* 134 S.Ct. at 2780.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder,* 406 U.S. 205, 92 S.Ct. 1526, 32 L.Ed.2d 15 (1972), and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. *See Holt,* 135 S.Ct. at 863. Thus, in *Yoder,* the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. 406 U.S. at 221-22, 92 S.Ct. 1526. Similarly, in *Holt,* the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities ... would be seriously compromised by allowing an inmate to grow a ½-inch beard." 135 S.Ct. at 863.

Here, the same framework leads to the opposite conclusion. Failing to enforce Title VII against the Funeral Home means the EEOC would be allowing a particular person — Stephens — to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. *See, e.g., United States v. Burke,* 504 U.S. 229, 238, 112 S.Ct. 1867, 119 L.Ed.2d 34 (1992) ("[I]t is beyond question that discrimination in employment on the basis of sex ... is, as ... this Court consistently has held, an invidious practice that causes grave harm to its victims.").[12] In this regard, this case is analogous to *Eternal Word,* in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

applying the accommodation procedure *to the plaintiffs in these cases* furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries — who may or may not share the same religious beliefs as their employer — have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

818 F.3d at 1155 (emphasis added). The *Eternal Word* court reasoned that "[u]nlike the exception made in *Yoder* for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." *Id.* Similarly, here, the EEOC's compelling

interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. *O Centro,* 546 U.S. at 431, 126 S.Ct. 1211. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA ... [,] is a higher-order right that necessarily supersedes a conflicting statutory right," Appellee Br. at 42. This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate... the First Amendment's guarantee of free exercise," *id.,* because it sweeps more broadly than the Constitution demands. *See Boerne,* 521 U.S. at 532, 117 S.Ct. 2157. And in any event, the Supreme Court has expressly recognized that compelling interests can, at times, override religious beliefs — even those that are squarely protected by the Free Exercise Clause. *See Cutter v. Wilkinson,* 544 U.S. 709, 722, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005) ("We do not read RLUIPA to elevate accommodation of religious observances over an institution's need to maintain order and safety. Our decisions indicate that an accommodation must be measured so that it does not override other significant interests."). We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." *Hobby Lobby,* 134 S.Ct. at 2780 (citing 42 U.S.C. §§ 2000bb-1(a), (b)). "The least-restrictive-means standard is exceptionally demanding," *id.* (citing *Boerne,* 521 U.S. at 532, 117 S.Ct. 2157), and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise constitutes the least restrictive means of furthering its compelling interests, *see id.* at 2779. Where an alternative option exists that furthers the government's interest "equally well," *see id.* at 2782, the government "must use it," *Holt,* 135 S.Ct. at 864 (quoting *United States v. Playboy Entm't Grp., Inc.,* 529 U.S. 803, 815, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000)). In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." *Hobby Lobby,* 134 S.Ct. at 2781 n.37 (quoting *Cutter,* 544 U.S. at 720, 125 S.Ct. 2113). Cost to

the government may also be "an important factor in the least-restrictive-means analysis." *Id.* at 2781.

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs. *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 861, 863.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to *dress* as a woman" and "would no longer *dress* as a man," *see* R. 54-5 (Rost 30(b)(6) Dep. at 136-37) (Page ID #1372) (emphasis added), the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to *represent himself* as a man," *id.* at 136 (Page ID #1372) (emphasis added), and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman," *id.* at 74, 138-39 (Page ID #1365, 1373). The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determinations, weigh the evidence, or draw [adverse] inferences from the facts," *Terry Barr Sales Agency, Inc. v. All-Lock Co.,* 96 F.3d 174, 178 (6th Cir. 1996) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)), the district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well," *Hobby Lobby,* 134 S.Ct. at 2782. Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." R. 54-5 (Rost 30(b)(6) Dep. at 136) (Page ID #1372). Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs." *See* Oral Arg. at 46:50-47:46.

The Funeral Home's proposed alternative — to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," Appellee Br. at 44-45 — is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions

of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes — a point that is not at issue in this case — the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.[13]

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. *See, e.g.,* Appellant Br. at 55-61; Intervenor Br. at 27-33. We agree.

To start, the Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." *O Centro,* 546 U.S. at 436, 126 S.Ct. 1211. The Court highlighted *Braunfeld v. Brown,* 366 U.S. 599, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961), as an example of a case where the "need for uniformity" trumped "claims for religious exemptions." *O Centro,* 546 U.S. at 435, 126 S.Ct. 1211. In *Braunfeld,* the plurality "denied a claimed exception to Sunday closing laws, in part because ... [t]he whole point of a `uniform day of rest for all workers' would have been defeated by exceptions." *O Centro,* 546 U.S. at 435, 126 S.Ct. 1211 (quoting *Sherbert,* 374 U.S. at 408, 83 S.Ct. 1790 (discussing *Braunfeld*)). *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro,* 546 U.S. at 435, 126 S.Ct. 1211, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in *Hobby Lobby,* as the majority opinion stated that its decision should not be read as providing a "shield" to those who seek to "cloak[] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." 134 S.Ct. at 2783. As the *Hobby Lobby* Court explained, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." *Id.* We understand this to mean that enforcement actions brought under Title VII, which aims to "provid[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, *see id.,* will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that "a RFRA defense can never prevail as a defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." *R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 857. But the majority *did* say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination. *Hobby Lobby,* 134 S.Ct. at 2783.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce. *See*

Redhead v. Conf. of Seventh-Day Adventists, 440 F.Supp.2d 211, 222 (E.D.N.Y. 2006) (holding that "the Title VII framework is the least restrictive means of furthering" the government's interest in avoiding discrimination against non-ministerial employees of religious organization), *adhered to on reconsideration,* 566 F.Supp.2d 125 (E.D.N.Y. 2008); *EEOC v. Preferred Mgmt. Corp.,* 216 F.Supp.2d 763, 810-11 (S.D. Ind. 2002) ("[I]n addition to finding that the EEOC's intrusion into [the defendant's] religious practices is pursuant to a compelling government interest," — i.e., "the eradication of employment discrimination based on the criteria identified in Title VII" — "we also find that the intrusion is the least restrictive means that Congress could have used to effectuate its purpose.").

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." *McAllen Grace Brethren Church v. Salazar,* 764 F.3d 465, 475 (5th Cir. 2014) (citing *Hobby Lobby,* 134 S.Ct. at 2781-82); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 547, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) ("It is established in our strict scrutiny jurisprudence that `a law cannot be regarded as protecting an interest of the highest order... when it leaves appreciable damage to that supposedly vital interest unprohibited.'" (omission in original) (quoting *Fla. Star v. B.J.F.,* 491 U.S. 524, 541-42, 109 S.Ct. 2603, 105 L.Ed.2d 443 (1989) (Scalia, J., concurring))). Indeed, a driving force in the *Hobby Lobby* Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with religious objections." *See* 134 S.Ct. at 2782. Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise," 42 U.S.C. § 2000e-2(e)(1) — and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. *See State v. Arlene's Flowers, Inc.,* 187 Wash.2d 804, 389 P.3d 543, 565-66 (2017) (collecting cases), *petition for cert. filed Arlene's Flowers, Inc. v. Washington,* 86 U.S.L.W. 3047(July14017)). These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner."

R.G. & G.R. Funeral Homes, Inc., 201 F.Supp.3d at 863 (emphasis omitted). This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. *See Smith,* 378 F.3d at 572 (holding that a plaintiff makes out a prima facie case for discrimination under Title VII when he pleads that "his *failure to conform* to sex stereotypes concerning how a man should look and behave was the driving force behind" an adverse employment action (emphasis added)). Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," *Barnes,* 401 F.3d at 734, and the right of female employees to refuse to "wear dresses or makeup," *Smith,* 378 F.3d at 574, without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless REVERSE the district court's grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we GRANT summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." *EEOC v. Bailey Co.,* 563 F.2d 439, 446 (6th Cir. 1977) (quoting inter alia, *Tipler v. E. I. duPont deNemours & Co.,* 443 F.2d 125, 131 (6th Cir. 1971)), *disapproved of on other grounds by Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978). The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey,* we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey,* a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. *Id.* at 442. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of

the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." *Id.* at 446. We determined, however, that the EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party — a white woman — had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work." *Id.* at 452 (citations omitted).

As we explained in *Bailey,* the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. *Id.* at 446 (quoting *Tipler,* 443 F.2d at 131). Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law.... Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation." *Id.* at 447 (quoting *Sanchez v. Standard Brands, Inc.,* 431 F.2d 455, 466 (5th Cir. 1970)).

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." *Id.* at 448. We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party." *Id.*

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court's decision in *General Telephone Company of the Northwest, Inc. v. EEOC,* 446 U.S. 318, 100 S.Ct. 1698, 64 L.Ed.2d 319 (1980). In *General Telephone,* the Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. *Id.* at 331, 100 S.Ct. 1698. As part of its reasoning, the Court found that various requirements of Rule 23 — such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3) — are incompatible with the EEOC's enforcement responsibilities under Title VII:

The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23 were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims

presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

Gen. Tel., 446 U.S. at 330-31, 100 S.Ct. 1698 (internal citations omitted). The EEOC argues that this passage directly contradicts the holding in *Bailey,* in which we rejected the EEOC's argument that it "can investigate evidence of any other discrimination called to its attention during the course of an investigation." *See* 563 F.2d at 446.

Though there may be merit to the EEOC's argument, *see EEOC v. Kronos Inc.,* 620 F.3d 287, 297 (3d Cir. 2010) (citing *General Telephone* for the proposition that "[o]nce the EEOC begins an investigation, it is not required to ignore facts that support additional claims of discrimination if it uncovers such evidence during the course of a reasonable investigation of the charge" (citing *Gen. Tel.,* 446 U.S. at 331, 100 S.Ct. 1698)), we need not resolve *Bailey*'s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey.* In *Bailey,* the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." 563 F.2d at 447. Here, by contrast, Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman.[14] And, unlike the EEOC's investigation of religious discrimination in *Bailey,* the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination — discrimination on the basis of sex — that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably expected to grow out of the initial charge of discrimination." *See Bailey,* 563 F.2d at 446. As we explained in *Davis v. Sodexho,* 157 F.3d 460 (6th Cir. 1998), "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." *Id.* at 463. And we have also cautioned that "EEOC charges must be liberally construed to determine whether ... there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of discrimination." *Leigh v. Bur. of State Lottery,* 1989 WL 62509, at *3 (6th Cir. June 13, 1989) (Table) (citing *Bailey,* 563 F.2d at 447). Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. R. 63-2 (Charge of Discrimination at 1) (Page ID #1952). It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-

specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc.*, 660 F.2d 1096 (6th Cir. 1981), in which "we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to represent them in securing the higher paying job designations." *Weigel v. Baptist Hosp. of E. Tenn.*, 302 F.3d 367, 380 (6th Cir. 2002) (citing *Farmer*, 660 F.2d at 1105). As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." *Id.* By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens — in this case, fiscal burdens — on its male and female employees.

We therefore REVERSE the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and REMAND with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

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

[1] We refer to Stephens using female pronouns, in accordance with the preference she has expressed through her briefing to this court.

[2] All facts drawn from Def.'s Statement of Facts (R. 55) are undisputed. *See* R. 64 (Pl.'s Counter Statement of Disputed Facts) (Page ID #2066-88).

[3] *See also* Appellee Br. at 16 ("It is a helpful exercise to think about *Price Waterhouse* and imagine that there was a dress code imposed which obligated Ms. Hopkins to wear a skirt while her male colleagues were obliged to wear pants. Had she simply been fired for wearing pants rather than a skirt, the case would have ended there — both sexes would have been equally burdened by the requirement to comply with their respective sex-specific standard. But

what the firm could not do was fire her for being aggressive or macho when it was tolerating or rewarding the behavior among men — and when it did, it relied on a stereotype to treat her disparately from the men in the firm.").

[4] Moreover, discrimination because of a person's transgender, intersex, or sexually indeterminate status is no less actionable than discrimination because of a person's identification with two religions, an unorthodox religion, or no religion at all. And "religious identity" can be just as fluid, variable, and difficult to define as "gender identity"; after all, both have "a deeply personal, internal genesis that lacks a fixed external referent." Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII,* 104 NW. U. L. REV. 1147, 1172 (2010) (advocating for "[t]he application of tests for religious identity to the problem of gender identity [because it] produces a more realistic, and therefore more appropriate, authentication framework than the current reliance on medical diagnoses and conformity with the gender binary").

[5] On the other hand, there is also evidence that Stephens was fired only because of her nonconforming appearance and behavior at work, and not because of her transgender identity. *See* R. 53-6 (Rost Dep. at 136-37) (Page ID #974) (At his deposition, when asked whether "the reason you fired [Stephens], was it because [Stephens] claimed that he was really a woman; is that why you fired [Stephens] or was it because he claimed — or that he would no longer dress as a man," Rost answered: "That he would no longer dress as a man," and when asked, "if Stephens had told you that he believed that he was a woman, but would only present as a woman outside of work, would you have terminated him," Rost answered: "No.").

[6] We acknowledge that *Barnes v. City of Cincinnati,* 401 F.3d 729 (6th Cir. 2005), read *Smith* as focusing on "look and behav[ior]." *Id.* at 737 ("By alleging that his failure to conform to sex stereotypes concerning how a man should look and behave was the driving force behind defendant's actions, Smith stated a claim for relief pursuant to Title VII's prohibition of sex discrimination."). That is not surprising, however, given that only "look and behavior," not status, were at issue in *Barnes*.

[7] Oddly, the *Vickers* court appears to have recognized that its new "observable-at-work" requirement cannot be squared with earlier precedent. Immediately after announcing this new requirement, the *Vickers* court cited *Smith* for the proposition that "a plaintiff hoping to succeed on a claim of sex stereotyping [must] show that he `fails to act *and/or identify with* his or her gender'" — a proposition that is necessarily broader than the narrow rule *Vickers* sought to announce. 453 F.3d at 764 (citing *Smith,* 378 F.3d at 575) (emphasis added). The *Vickers* court also seemingly recognized *Barnes* as binding authority, *see id.* (citing *Barnes*), but portrayed the decision as "affirming [the] district court's denial of defendant's motion for summary judgment as a matter of law on discrimination claim where pre-operative male-to-female transsexual was demoted based on his `ambiguous sexuality and his practice of dressing as a woman' and his co-workers' assertions that he was `not sufficiently masculine.'" *Id.* This summary is accurate as far as it goes, but it entirely omits the discussion in *Barnes* of discrimination against the plaintiff based on "his practice of dressing as a woman *outside of work.*" 401 F.3d at 738 (emphasis added).

[8] For a similar reason, we decline to consider the argument raised by several amici that reading RFRA to "permit a religious accommodation that imposes material costs on third parties or interferes with the exercise of rights held by others" would violate the Establishment Clause of the First Amendment. *See* Private Rights/Public Conscience Br. at 15; *see also id.* at 5-15; Americans United Br. at 6-15. Amici may not raise "issues or arguments [that] ... `exceed those properly raised by the parties.'" *Shoemaker v. City of Howell,* 795 F.3d 553, 562 (6th Cir. 2015) (quoting *Cellnet Commc'ns, Inc. v. FCC,* 149 F.3d 429, 433 (6th Cir. 1998)). Although Stephens notes that the Establishment Clause "requires the government and courts to account for the harms a religious exemption to Title VII would impose on employees," Intervenor Br. at 26, no party to this action presses the broad constitutional argument that amici seek to present. We therefore will not address the merits of amici's position.

[9] Though a number of these decisions have been vacated on grounds that are not relevant to this case, their reasoning remains useful here.

[10] Even ignoring any adverse inferences that might be drawn from the incongruity between Rost's earlier deposition testimony and the Funeral Home's current litigation position, as we must do when considering whether summary judgment is appropriate in the EEOC's favor, we conclude as a matter of law that Rost does not express

"support[] [for] the idea that sex is a changeable social construct rather than an immutable God-given gift" by continuing to hire Stephens, *see* R. 54-2 (Rost Aff. ¶¶ 43, 45) (Page ID #1334-35) — even if Rost sincerely believes otherwise.

[11] While the district court did not hold that the EEOC had conclusively established the "compelling interest" element of its opposition to the Funeral Home's RFRA defense, it assumed so arguendo. *See R.G. & G.R. Harris Funeral Homes, Inc.,* 201 F.Supp.3d at 857-59.

[12] Courts have repeatedly acknowledged that Title VII serves a compelling interest in eradicating all forms of invidious employment discrimination proscribed by the statute. *See, e.g., EEOC v. Miss. Coll.,* 626 F.2d 477, 488-89 (5th Cir. 1980). As the Supreme Court stated, the "stigmatizing injury" of discrimination, "and the denial of equal opportunities that accompanies it, is surely felt as strongly by persons suffering discrimination on the basis of their sex as by those treated differently because of their race." *Roberts v. U.S. Jaycees,* 468 U.S. 609, 625, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *see also EEOC v. Pac. Press Publ'g Ass'n,* 676 F.2d 1272, 1280 (9th Cir. 1982) ("By enacting Title VII, Congress clearly targeted the elimination of all forms of discrimination as a `highest priority.' Congress' purpose to end discrimination is equally if not more compelling than other interests that have been held to justify legislation that burdened the exercise of religious convictions."), *abrogation on other grounds recognized by Am. Friends Serv. Comm. Corp. v. Thornburgh,* 951 F.2d 957, 960 (9th Cir. 1991).

[13] In its district court briefing, the Funeral Home proposed three additional purportedly less restrictive alternatives: the government could hire Stephens; the government could pay Stephens a full salary and benefits until she secures comparable employment; or the government could provide incentives to other employers to hire Stephens and allow her to dress as she pleases. R. 67 (Def.'s Reply Mem. of Law in Support of Def.'s Mot. for Summ. J. at 17-18) (Page ID #2117-18). Not only do these proposals fail to further the EEOC's interest enabling Stephens to work for the Funeral Home without facing discrimination, but they also fail to consider the cost to the government, which is "an important factor in the least-restrictive-means analysis." *Hobby Lobby,* 134 S.Ct. at 2781. We agree with the EEOC that the Funeral Home's suggestions — which it no longer pushes on appeal — are not viable alternatives to enforcing Title VII in this case, as they do not serve the EEOC's interest in eradicating discrimination "equally well." *See id.* at 2782.

[14] The Funeral Home insists that it would provide female funeral directors with a company-issued suit if it had any female Funeral Directors. *See* R. 53-3 (Rost Aff. ¶ 54) (Page ID #939). This is a factual claim that we cannot credit at the summary-judgment stage.

305 F.Supp.3d 327 (2018)

Daniela ARROYO GONZALEZ; Victoria Rodriguez Roldan; J.G.; Puerto Rico Para Todas, Plaintiffs
v.
Ricardo ROSSELLO NEVARES, in his official capacity as Governor of the Commonwealth of Puerto Rico; Rafael Rodriguez-Mercado, in his official capacity as Secretary of the Department of Health of the Commonwealth of Puerto Rico; Wanda LLovet Diaz, in her official capacity as Director of the Division of Demographic Registry and Vital Statistics of the Commonwealth of Puerto Rico, Defendants.

Civil 17-1457CCC.

United States District Court, D. Puerto Rico.

Signed April 20, 2018.

OPINION AND ORDER

CARMEN CONSUELO CEREZO, United States District Judge.

This is an action for declaratory relief brought by three transgenders and an organization that advocates for the civil rights of LGBT people in the Commonwealth of Puerto Rico. They seek one common determination: that defendants be ordered to permit transgender persons born in Puerto Rico to correct their birth certificates to accurately reflect their true sex, consistent with their gender identity, in accordance with the practice delineated in 24 L.P.R.A. section 1136[1] and without adhering to the practice delineated in 24 L.P.R.A. section 1231 of using a strike-out line to change one's name, or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate. *See* Amended Complaint (d.e. 15), Prayer's Clause (C), p. 40. A Motion to Dismiss filed on June 12, 2017 by defendants Ricardo Rossello Nevares, in his official capacity as Governor of the Commonwealth of Puerto Rico; Rafael Rodriguez Mercado, in his official capacity as Secretary of the Department of Health of the Commonwealth of Puerto Rico; and Wanda LLovet Diaz, in her official capacity as Director of the Division of Demographic Registry and Vital Statistics of the Commonwealth of Puerto Rico (d.e. 22), was denied on August 29, 2017 (d.e. 35). Defendants have not filed an answer to the amended complaint. Plaintiffs filed a Motion for Summary Judgment on June 26, 2017 (d.e. 26), accompanied by a Statement of Material Facts (d.e. 26-1).

Having considered the Motion for Summary Judgment, the declarations under penalty of perjury executed by the plaintiffs and other supporting materials, as well as defendants' opposition, the Court sets forth the following material facts that remain undisputed:

Findings of Fact

1. Plaintiffs are three transgender individuals and an organization with transgender members that seek to have their Puerto Rico birth certificates amended to accurately reflect their gender identity.

2. Ms. Daniela Arroyo's and Ms. Victoria Rodriguez's gender identity and expression is female.

3. Mr. J.G.'s gender identity and expression is male. His transgender status is not publicly known, nor known by his current employer or co-workers.

4. Ms. Arroyo and Ms. Rodriguez have aligned their body characteristics, appearance, and lived experience with their female gender identity.

5. Mr. J.G. has aligned his body characteristics, appearance, and lived experience with his male gender identity.

6. All three plaintiffs wish to correct the gender marker on their birth certificates.

7. Ms. Arroyo and Ms. Rodriguez wish to correct the gender markers on their birth certificates to accurately reflect the identity of each as a woman, as determined by their gender identity.

8. Mr. J.G. wishes to correct the gender marker on his birth certificate to accurately reflect his identity as a man, as determined by his gender identity.

9. Ms. Arroyo's and Ms. Rodriguez' birth certificates do not reflect their true identity, are incongruent with their female identity and expression, and conflict with their other identification documents.

10. Mr. J.G.'s birth certificate does not reflect his true identity, is incongruent with his male identity and expression, and conflicts with his other identification documents.

11. Ms. Rodríguez changed her name and corrected the gender marker on her driver's license, U.S. Passport, and Social Security records.

12. Mr. J.G. changed his name on his birth certificate and has also changed his name and corrected the gender marker on his driver's license and Social Security records.

13. An individual's birth certificate is a primary identification document. In Puerto Rico, it is needed to obtain a driver's license, a marriage license, a U.S. passport, a Social Security card, a voting card, and generally as proof of identification to conduct banking transactions and other business.

14. Pursuant to its Birth Certificate Policy, Puerto Rico categorically requires that birth certificates reflect the sex assigned at birth and prohibits transgender persons from correcting the gender marker in their birth certificates so that these accurately reflect the persons' sex, as determined by their gender identity.

15. Birth certificates in Puerto Rico indicate a person's birth-assigned sex based on the appearance of genitalia rather than their actual sex, as determined by their gender identity and lived experience.

16. Transgenderism is an immutable characteristic determined by the hormonal balance a person is born with. It is an innate trait caused by an individual's biological features and genetic makeup. Some scientists confirm that brain development is influenced by the prenatal environment, that is, to what hormones the fetus was exposed to in the uterus. For example, exposure to inadequate levels of estrogen during development of the fetus because of insufficient

estrogen production in the fetus' immediate environment or poor receptive sensitivity in the fetus, are possible scenarios underlying insufficient feminization.

17. Ms. Rodriguez is 28 years old, born in Puerto Rico, and currently a resident of the District of Columbia metropolitan area. She is a graduate of the University of Puerto Rico and of the University of Maine School of Law. She is a transgender who was designated "male" in her birth certificate. She learned the term transgender at the age of 14. Ms. Rodriguez kept her gender secret until she was 18 and had started college for fear of rejection by her family. In 2007, by her sophomore year, she asked her professors and others to call her by her chosen name, Victoria. Calling her `Victoria' during the roll call prevented disclosure of her transgender status to other students. She was diagnosed that same year by her medical provider with gender dysphoria and underwent hormone therapy to relieve the condition. In 2011, while at law school, she legally changed her name and gender marker on all her identification documents, except for her birth certificate.

18. Ms. Arroyo is 18 years old, a high school graduate, transgender, designated "male" in her birth certificate, who states she never questioned that she was a girl, so informed her family when she was a young girl, and told her mother that she was a transgender at the age 14. This led her to begin at that age to socially and medically transition to align her life experience and body characteristics with her gender identity. She began hormone therapy in 2016 after having been diagnosed with gender dysphoria in 2013. Ms. Arroyo is cofounder of the Puerto Rico Trans Youth Coalition since 2015, an organization that provides a network for transgender youth in Puerto Rico with over 200 participants. In February 2017, she legally changed her name to her current female name. In March 2017, she began the process to correct her name and gender marker in her identification documents to accurately reflect her gender identity as female but has been prohibited from correcting the gender marker in her birth certificate because of Puerto Rico's Birth Certificate Policy, thereby rendering her birth certificate incongruent with her other identification papers.

19. Mr. J.G. is 25 years old, born and raised in San Juan, Puerto Rico, and designated as female on his birth certificate. He described his childhood as a solitary life. Since age four (4) he knew he was different from the children whose assigned sex at birth was female. This caused him profound discomfort and it was not until his young adulthood that Mr. J.G. was able to understand the cause of his distress: the clash between his perception of self and the sex characteristics of his body. In 2015, he commenced to medically transition to align his body characteristics and live his true self, as a man. That same year, having been diagnosed with gender dysphoria, he commenced hormone treatment.

20. The incongruence between a transgender person's gender identity and sex assigned at birth is associated with gender dysphoria. Gender dysphoria is a serious medical condition recognized in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders, Fifth Ed. (2013)("DSM-V").

21. Gender dysphoria refers to clinically significant distress that can result when a person's gender identity differs from the person's birth-assigned sex. If left untreated, gender dysphoria may result in psychological distress, anxiety, depression, suicidal ideation or even self-inflicted harm.

22. Identity documents that are consistent with one's lived experience affirm and consolidate one's gender identity, mitigating distress and functional consequences. Changes in gender

presentation and role to feminize or masculinize appearance as well as social acceptance and legal legitimacy are crucial components of treatment for gender dysphoria. Social transition involves dressing, grooming, and otherwise outwardly presenting oneself through social signifiers of a person's true sex as determined by their affirmed gender identity.

23. Not every person suffering from gender dysphoria undergoes the same treatment. From a medical and scientific perspective, there is no basis for refusing to acknowledge a transgender person's true sex based on whether that person has undergone surgery or any other medical treatment.

24. Ms. Arroyo was diagnosed with gender dysphoria by her medical provider in the year 2013. In 2016, in consultation with her medical and mental health professionals, she began to undergo medically-necessary treatment, specifically hormone therapy, to relieve her gender dysphoria and to bring her body into alignment with her gender identity. During this transition, she brought her external appearance into alignment with her female identity.

25. Ms. Rodriguez was diagnosed with gender dysphoria by her medical provider in the year 2007. In consultation with her medical and mental health professionals, she began hormone therapy, to relieve her gender dysphoria and bring her body into alignment with her female identity.

26. Mr. J.G. was diagnosed in 2015 with gender dysphoria. In consultation with his medical and mental health professionals, he began to undergo hormone therapy to relieve his gender dysphoria and bring his body in alignment with his gender identity. These steps brought his physical appearance into alignment with his male identity.

27. Ms. Arroyo and Mr. J.G. corrected their names on their respective birth certificates but pursuant to Puerto Rico's birth certificate policy, were prohibited from correcting the gender marker on their birth certificates.

28. Ms. Rodriguez has not changed her name on her birth certificate since she deems it to be futile given the prohibition related to the correction of the gender marker in her certificate.

29. Ms. Arroyo asserts she feels stigmatized and harmed by Puerto Rico's birth certificate policy and claims her right to possess identity documents that accurately reflect who she is — a woman.

30. Ms. Rodriguez states she considers it futile to correct the name on her birth certificate since it is impossible to obtain a correction of the gender marker on her birth certificate. As a consequence, her birth certificate, which identifies her with a male name and sex, and her other identification documents, drivers' license and U.S. passport, are incongruent with each other. She asserts the need for her identity documents to be consistent with the woman that she is.

31. Mr. J.G. legally changed his name in 2016 to one traditionally associated with men. He updated his name and corrected the gender marker in his Puerto Rico driver's license in accordance with a policy followed by the Department of Transportation and Public Works of the Commonwealth. He also corrected his Social Security records and updated his name in his birth certificate. However, due to Puerto Rico's Birth Certificate Policy, he was precluded from correcting the gender marker on his birth certificate. He attempted in April 2016 to correct the gender marker on his Puerto Rico voter identification card after the local Board of Registration staff requested his birth certificate. This was denied. As a result of this, Mr. J.G. did not vote in the 2016 election because the presentation of his voter identification card disclosed his transgender status.

32. The forced disclosure of the transgender status of plaintiffs and other transgender persons by way of inaccurate birth certificates exposes them to prejudice, discrimination, distress, harassment, and violence.

33. On November 14, 2008, the Commonwealth of Puerto Rico (the "Commonwealth") issued Executive Order OE-2008-57 that established as a matter of public policy the prohibition of discrimination in the provision of public services. It applies to all public agencies and instrumentalities, including the Demographic Registry of Puerto Rico. Such sweeping outlawed discrimination in all forms, including gender identity.

34. Pursuant to this public policy, on August 10, 2015, the Commonwealth issued Executive Order OE-2015-029, permitting transgender individuals to change their gender marker in their driver's license. On June 19, 2014, the Department of Transportation and Public Works issued regulations implementing the Executive Order.

35. Pursuant to the aforementioned Executive Orders, on May 31, 2016, the Electoral Commission of the Commonwealth of Puerto Rico issued Resolution CEE-RS-16-9, permitting transgender individuals to change the gender marker on their voter identification cards.

36. The Department of Transportation and Public Works and the Electoral Commission of the Commonwealth of Puerto Rico both issue identification cards that reflect the applicant's correct gender marker in accordance with the public policy outlined in OE-2008-57, without disclosing the sex that was assigned at birth.

Based on these Findings of Fact, the Court states the following:

Conclusions of Law

The Supreme Court recognizes that "a constitutional right to privacy is now well established." *Daury v. Smith,* 842 F.2d 9, 13 (1st Cir. 1988) (referring to *Roe v. Wade,* 410 U.S. 113, 93 S.Ct. 705, 35 L.Ed.2d 147 (1973); *Griswold v. Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965). The majority opinion in *Ex parte Delgado Hernández,* 165 D.P.R. 170 (2005), which defendants relied on in their opposition, is limited to the statutory interpretation of the Demographic Registry Law of Puerto Rico, 24 L.P.R.A. § 1071 et seq., and does not supersede this fundamental constitutional right. *See Fournier v. Reardon,* 160 F.3d 754, 758 (1st Cir. 1998) (stating that the constitutional right to privacy is deemed fundamental).

"The courts have identified two clusters of personal privacy rights recognized by the Fourteenth Amendment. One bundle of rights relates to ensuring autonomy in making certain kinds of significant personal decisions; the other relates to ensuring confidentiality of personal matters." *Vega-Rodriguez v. Puerto Rico Telephone Co.,* 110 F.3d 174, 182-83 (1st Cir. D.P.R. 1997) (referring to *Whalen v. Roe,* 429 U.S. 589, 598-600, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977); *Borucki v. Ryan,* 827 F.2d 836, 840 (1st Cir. 1987)).

"The autonomy branch of the Fourteenth Amendment right to privacy is limited to decisions arising in the personal sphere — matters relating to marriage, procreation, contraception, family relationships, child rearing, and the like." *Vega-Rodriguez,* 110 F.3d at 183. The confidentiality branch, also referred to as `informational privacy', *see National Aeronautics and Space Administration v. Nelson,* 562 U.S. 134, 146, 131 S.Ct. 746, 756, 178 L.Ed. 2d 667 (2011),

"includes `the individual interest in avoiding the disclosure of personal matters ...'" *Daury,* 842 F.2d at 13 (citing *Whalen,* 429 U.S. at 599, 97 S.Ct. 869). The Commonwealth's ban on changing the gender marker in plaintiffs' birth certificates implicates both.

The Commonwealth's forced disclosure of plaintiffs' transgender status violates their constitutional right to decisional privacy. Much like matters relating to marriage, procreation, contraception, family relationships, and child rearing, "there are few areas which more closely intimate facts of a personal nature" than one's transgender status. *Doe v. Town of Plymouth,* 825 F.Supp. 1102, 1107 (D. Mass. 1993) (finding the constitutional right to privacy encompasses nondisclosure of HIV status). "The decision of who to tell and when to relate such information is an emotionally sensitive area `fraught with serious implications for that individual.'" *Id.* (citing *Doe v. Coughlin,* 697 F.Supp. 1234, 1237 (N.D.N.Y. 1988). Disclosing that one is transgender involves a deep personal choice which the government cannot compel, unless disclosure furthers a valid public interest. "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 851, 112 S.Ct. 2791, 2807, 120 L.Ed. 2d 674 (1992) (Emphasis ours).

By permitting plaintiffs to change the name on their birth certificate, while prohibiting the change to their gender markers, the Commonwealth forces them to disclose their transgender status in violation of their constitutional right to informational privacy. Such forced disclosure of a transgender person's most private information is not justified by any legitimate government interest. It does not further public safety, such that it would amount to a valid exercise of police power. *See Whalen,* 429 U.S. at 598, 97 S.Ct. 869. To the contrary, it exposes transgender individuals to a substantial risk of stigma, discrimination, intimidation, violence, and danger. Forcing disclosure of transgender identity chills speech and restrains engagement in the democratic process in order for transgenders to protect themselves from the real possibility of harm and humiliation. The Commonwealth's inconsistent policies not only harm the plaintiffs before the Court; it also hurts society as a whole by depriving all from the voices of the transgender community.

Having determined that the Commonwealth's Birth Certificate Policy violates transgender persons' decisional privacy and informational privacy, and further considering that: (1) the Commonwealth has adopted a public policy that prohibits discrimination by public agencies and instrumentalities in providing their services, including discrimination based on gender identity, and (2) the Department of Transportation and Motor Vehicles and the Election Commission of the Commonwealth have enabled transgender individuals to apply for new official identifications that display their true gender, without disclosing their transgender status, IT IS HEREBY ORDERED AND ADJUDGED that the Demographic Registry of the Commonwealth of Puerto Rico permit forthwith that transgender individuals change the gender marker in their birth certificates, as delineated in 24 L.P.R.A. section 1136, specifically, by issuing a new birth certificate with the applicant's true gender, without using a strike-out line or otherwise including

any information that would disclose a person's transgender status on the face of the birth certificate, in compliance with this Opinion and Order.

The Demographic Registry of the Commonwealth of Puerto Rico SHALL ADOPT the criteria of the Department of Transportation and Public Work's "Request to Change Transgender Persons' Gender Marker," DTOP-DIS-324 Form, as the application form to be submitted by transgenders and which shall be accepted as the first step towards the issuance of their new birth certificates, in compliance with the Court's mandate. *See* Attachment A to the Judgment. The transgender individual shall present the application accompanied by one of the following documents: (1) a passport that reflects a person's true gender, whether female or male, (2) a driver's license that reflects the person's true gender, whether female or male, or (3) a certification issued by a healthcare professional or mental health professional with whom the person has a doctor-patient relationship stating, based on his or her professional opinion, the true gender identity of the applicant, whether female or male, and that it is expected that this will continue to be the gender with which the applicant will identify him or herself in the future. If the applicant has not had any of the documents requested previously issued, a health care professional or mental health professional with whom the applicant has a doctor-patient relationship must certify based on his or her professional opinion that the true gender identity of the applicant is ( ) female or ( ) male and that it is expected that this will continue to be the gender with which the applicant will identify him or herself in the future. *See* Part B of DTOP-DIS-32 Form, which is included as Attachment A to the Judgment.

Conclusion

The right to identify our own existence lies at the heart of one's humanity. And so, we must heed their voices: "the woman that I am," "the man that I am." Plaintiffs know they are not fodder for memoranda legalese. They have stepped up for those whose voices, debilitated by raw discrimination, have been hushed into silence. They cannot wait for another generation, hoping for a lawmaker to act. They, like Linda Brown, took the steps to the courthouse to demand what is due:

their right to exist, to live more and die less.

SO ORDERED.

SUMMARY JUDGMENT

Pursuant to the Findings of Fact and Conclusions of Law set forth in the Opinion and Order issued on this same date, and the Court having found that the Commonwealth's Birth Certificate Policy violates transgender persons' decisional privacy and informational privacy, and further considering that (1) the Commonwealth has adopted a public policy that prohibits discrimination by public agencies and instrumentalities in providing their services, including discrimination based on gender identity, and (2) the Department of Transportation and Motor Vehicles and the Election Commission of the Commonwealth having enabled transgender individuals to apply for new official identifications that display their true gender, without disclosing their transgender status, IT IS HEREBY ORDERED, ADJUDGED and DECREED that the Demographic

Registry of Puerto Rico shall allow forthwith that transgender individuals change the gender marker in their birth certificates, as delineated in 24 L.P.R.A. section 1136, specifically, by issuing a new birth certificate with the applicant's true gender, without using a strike-out line or otherwise including any information that would disclose a person's transgender status on the face of the birth certificate, in compliance with the Opinion and Order.

It is further ORDERED, ADJUDGED and DECREED that the Demographic Registry of Puerto Rico SHALL ADOPT the criteria of the Department of Transportation and Public Work's "Request to Change Transgender Persons' Gender Marker," DTOP-DIS-324 Form, as the application form to be submitted by transgenders and which shall be accepted as the first step towards the issuance of their new birth certificates, in compliance with the Court's mandate. *See* Attachment A. The transgender individual shall present the application accompanied by one of the following documents: (1) a passport that reflects the person's true gender, or (2) a driver's license that reflects the person's true gender, or (3) a certification issued by a healthcare professional or mental health professional with whom the person has a doctor-patient relationship stating that based on his or her professional opinion the true gender identity of the applicant is female or male and that it is expected that this will continue to be the gender with which the applicant will identify him or herself in the future. If the applicant has not had any of the documents requested previously issued, a health care professional or mental health professional with whom the applicant has a doctor-patient relationship must certify based on his or her professional opinion that the true gender identity of the applicant is () female or () male and that it is expected that this will continue to be the gender with which the applicant will identify him or herself in the future. *See* Part B of DTOP-DIS-324 Form, which is included as Attachment A to this Judgment.

It is hereby ORDERED, ADJUDGED, and DECREED that summary judgment be and is hereby entered DISMISSING this action, WITH PREJUDICE.

SO ORDERED AND ADJUDGED.

Attachment

DTOP-DIS-324 THE COMMONWEALTH OF PUERTO RICO DTOP LOGO DEPARTMENT OF TRANSPORTATION AND PUBLIC WORKS DIRECTORATE OF DRIVER SERVICES

REQUEST TO CHANGE TRANSGENDER PERSONS GENDER MARKER

Please provide the information requested below using a pen or arty other mechanical keyboard means available to you.

Part A — APPLICANTS PERSONAL INFORMATION

The applicant must present this form accompanied by one of the following documents: birth certificate, passport, or a certification issued by a healthcare professional or a mental health professional with whom they have a doctor patient relationship. If the applicant has not had any of the documents requested previously issued, a healthcare professional or a mental health professional with whom the applicant has a doctor-patient relationship must complete part B of this form.

_____ _____ _____ _____ Name Initial Paternal surname Maternal surname Social Security number ____ ____ ____
_____ Driver's license/identification card number
_____
_____
_____
_____ Street address Postal address I hereby request that a [] driver's license, [] identification card, be issued to my name with the gender marker selected below: [] Female [] Male I, _____ having been duly advised and under penalty of perjury, hereto certify: That this petition responds to my exclusive Interest in that the driver's license or Identification card issued to me by this Department be in keeping with the gender by which I identify myself, and that I am not making this request with the Intent to defraud nor to commit any illegal act.

_____
_____ Applicant's signature Date (month/day/year)

Part B — Information of the Healthcare Clinician evaluating the applicant

_____ _____
_____ Name of the evaluating healthcare clinician Initial Surnames _____ Medical title of the evaluating healthcare clinician (psychologist, therapist, social worker, Doc, case manager, counselor or assessment specialist") _____
_____
_____
_____ Street address Postal address Telephone number[____]-____-____
_____ License number of the evaluating healthcare professional or their supervisor For all intents and purposes, and based on my professional opinion I certify that the gender identity of the applicant is [] female [] male, and that it is to be expected that this will continue to be the gender with which the applicant will identify him or herself in the future. I certify, under penalty of perjury, that the information provided herein is true and accurate.

_____ _____

_____ Signature of evaluating healthcare professional/clinician License No. Date (month/day/year) Note: Any person(s) who submit fraudulent Information, photographs or who conceals information from the Secretary to obtain a driver's license or identification card will incur in a misdemeanor offense pursuant to Article 3.23 of the Puerto Rico Vehicle and Traffic Act Revised on May 3, 2016 www.dotdtop.gop.pr 3/4/2018 I, ENITH M. VALDES, a Certified Interpreter by the Administrative Office of the United States Courts, do hereby certify that this document is a true and accurate translation of its original.

[1] 24 L.P.R.A. section 1136 provides: "If the birth of an adoptee had previously been registered in the Vital Statistics Registry, the registration certificate of such birth shall be substituted for another showing the new juridic status of the registered child, as if he were a legitimate child of the adopters; Provided, that the original registration certificate of the birth of the adoptee, the decision of the court, and other documents shall be kept in the Registry in a sealed envelope and shall be confidential documents. In no registration certificate issued by the Registry shall the fact of the original registration be set forth, unless the petitioner of said certificate has expressly required the showing of such facts and a competent court has so ordered for justified causes; Provided, That such authorization shall not be required when the applicant be the adopter or the adoptee." (Emphasis ours).

The Washington Post | **On Small Business** Perspective

A New York company must pay $5.1 million for demanding religious practices from employees

By **Gene Marks**
Contributor
April 30, 2018

A reminder to anyone running a business: You should probably keep religion out of it.

That message was made loud and clear last week when a New York federal jury awarded 10 former and current employees of a Long Island company $5.1 million because the company was found to have forced them to practice certain religious activities. The company, United Health Programs of America, (and its parent, Cost Containment Group) provides insurance and other employee savings and benefit plan services for its customers.

According to the original lawsuit filed by the Equal Employment Opportunity Commission in 2014, United Health Programs employees were being forced to follow an internal "Harnessing Happiness" system started by an aunt of the owners in 2007 that required them to engage in activities such as prayers, religious workshops and "spiritual cleansing rituals." Reuters reported that employees were also asked to "thank God" for their jobs and say "I love you" to managers and colleagues — or risk termination.

Nine employees said the "religiously infused atmosphere" created a hostile work environment for them, and the jury agreed. The same jury also found that another employee was fired for opposing the practices. A judge had previously ruled that the Harnessing Happiness system — which was also known as "Onionhead" — constituted a religion.

If you're thinking of holding a prayer meeting or anything else remotely related to religion in your company, it may not be a great idea. Not only can it make some people uncomfortable, but it also could be against the law. Title VII of the Civil Rights Act of 1964 forbids employers from coercing employees to engage in religious practices at work and bars them from firing or taking other adverse action against those who oppose such practices.

The EEOC felt that in this case, religion was being pushed on employees. "Title VII prohibits religious discrimination of this sort and makes what happened at Cost Containment Group unlawful," EEOC trial attorney Charles Coleman Jr. said in a news release. "Employees cannot be forced to participate in religious activities by their employer."

The EEOC is also seeking back pay for the employee who was fired.

Gene Marks
Gene Marks owns the Marks Group, a Bala Cynwyd, Pa.-based consulting firm that helps clients with customer relationship management. Marks is an author and a certified public accountant, and he writes regularly for The Post's On Small Business blog. For more about Marks, visit genemarks.com.