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

IN THE Supreme Court of the United States

GERALD LYNN BOSTOCK, *Petitioner*,
v.
CLAYTON COUNTY, GEORGIA, *Respondent*.

ALTITUDE EXPRESS, INC., *et al*., *Petitioners*,
v.
MELISSA ZARDA, as Executor of the Estate of Donald Zarda, *et al*., *Respondents*.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Petitioner*,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *et al*., *Respondents*.

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

BRIEF FOR THE STATES OF TENNESSEE, NEBRASKA, TEXAS, ALABAMA, ALASKA, ARKANSAS, IDAHO, LOUISIANA, MISSOURI, OHIO, OKLAHOMA, SOUTH CAROLINA, SOUTH DAKOTA, WEST VIRGINIA, AND THE COMMONWEALTH OF KENTUCKY BY AND THROUGH GOVERNOR MATT BEVIN AS *AMICI CURIAE* IN SUPPORT OF THE EMPLOYERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTERESTS OF *AMICI CURIAE*

Amici curiae are the States of Tennessee, Nebraska, Texas, Alabama, Alaska, Arkansas, Idaho, Louisiana, Missouri, Ohio, Oklahoma, South Carolina, South Dakota, West Virginia, and the Commonwealth of Kentucky by and through Governor Matt Bevin.[1] Congress amended Title VII in 1972 pursuant to its authority under section 5 of the Fourteenth Amendment to make its prohibitions applicable to States. *See Fitzpatrick v. Bitzer*, 427 U.S. 445, 447 (1976). As employers subject to Title VII, *amici* States have a strong interest in ensuring that this Court interprets the statute according to its plain language and in a manner that does not exceed Congress's authority under section 5 to enforce the requirements of the Fourteenth Amendment. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 88 (2000) (Congress may not "substantively redefine the States' legal obligations").

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[1] No counsel for any party authored this brief, in whole or in part, and no person or entity other than *amici* States contributed monetarily to its preparation or submission.

Amici States also have a strong interest in preserving the respective and separate roles of Congress and the federal judiciary. The Constitution assigns policymaking authority to Congress for good reason: Congress is the branch of government best suited to make sensitive policy choices that require consideration of competing interests. When a federal court rewrites a federal statute rather than deferring to Congress, it deprives the States of the opportunity to weigh in on that question through the political process. It also impedes state-level efforts to develop solutions in the absence of congressional action.

The plain language of Title VII, which reflects a congressional policy choice, does not prohibit discrimination based on sexual orientation or gender identity. *Amici* States file this brief to urge the Court to leave to Congress and to the political process any decision to make a different policy choice.

SUMMARY OF THE ARGUMENT

The question presented in these cases is not whether federal law *should* prohibit discrimination based on sexual orientation or gender identity. That is a question on which there is a wide divergence of opinion, and one on which this brief takes no position. The question instead is much simpler: Does Title VII, as enacted by Congress in 1964 and as subsequently amended, prohibit those forms of discrimination?

Application of traditional tools of statutory construction yields an easy answer: no. Title VII prohibits only "sex" discrimination, and the plain meaning of "sex" is biological status as male or female,

not sexual orientation or gender identity. Were there any doubt about this, the canon of constitutional doubt would require this interpretation because a broader reading could render Congress's abrogation of the States' sovereign immunity invalid.

To the extent these cases involve a normative question, it is the important question of which branch of government—the judiciary or Congress—should make policy. The Constitution provides an easy answer to that question: Congress. Sensitive policy decisions, such as whether to extend federal antidiscrimination laws to prohibit discrimination based on sexual orientation or gender identity, are for Congress, not the courts. And when the courts usurp Congress's policymaking authority, they both circumvent constitutional strictures designed to protect the States' interests and prematurely halt legislative efforts at the state level.

1. Title VII prohibits employers from discriminating against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). The plain and unambiguous meaning of "sex" is biological status as male or female. That was the common understanding of "sex" at the time Congress enacted Title VII, as evidenced by dictionary definitions of that word and a decades-long consensus among lower courts that Title VII does not prohibit discrimination based on sexual orientation or gender identity. Far from being synonymous with "sex," the terms "sexual orientation" and "gender identity" have long been used in contrast with "sex" to mean something distinct. And Congress's legislative efforts since 1964 confirm that

discrimination based on "sex" does not include discrimination based on sexual orientation or gender identity.

2. Alternative theories for construing Title VII to prohibit discrimination based on sexual orientation or gender identity are fruitless. The plurality opinion in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), merely clarified that evidence of sex stereotyping can be relevant to a claim of sex discrimination. But discrimination based on sexual orientation or gender identity does not involve a sex-specific stereotype—i.e., one that applies specifically to males or females. So *Price Waterhouse* provides no support for reading Title VII to prohibit those forms of discrimination. Nor is discrimination based on sexual orientation analogous to anti-miscegenation laws. The latter are prohibited because they are inherently racist. Discrimination based on sexual orientation, by contrast, is not inherently sexist.

3. If there were any doubt about the correct interpretation of Title VII, the constitutional-doubt canon would require the Court to adopt the narrower interpretation. Congress's application of Title VII to the States relied on its section 5 authority to enforce the Fourteenth Amendment. But Congress may abrogate state sovereign immunity only to remedy violations of the Constitution by the States; it may not substantively redefine a State's constitutional obligations. Thus, there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *City of Boerne v. Flores*, 521 U.S. 507, 520 (1997). A serious

constitutional question exists as to whether Congress could validly abrogate state sovereign immunity for claims of discrimination based on sexual orientation or gender identity, because Congress never identified any pattern of such discrimination by the States, much less any pattern that amounted to a constitutional violation. To avoid that difficult constitutional question, the Court should reject the invitation to read Title VII broadly.

4. The Constitution assigns to Congress, not the courts, the job of making policy. Because Congress is the branch of government that is most responsive to the people, it is the best positioned to weigh competing values and strike the appropriate balance among them. Federal antidiscrimination laws reflect just such a balance. And the question whether to extend those laws to prohibit discrimination based on sexual orientation or gender identity requires additional sensitive decisions, especially in the Title IX context. Congress should make those choices, not this Court. Leaving the choice to Congress better respects state prerogatives, both by preserving Article I requirements that are designed to protect state interests and by allowing the States to continue developing solutions until Congress acts.

ARGUMENT

I. Title VII Prohibits Discrimination Because of Sex, not Sexual Orientation, Gender Identity, or Transgender Status.

Since 1964, Title VII has prohibited employers from discriminating against any individual with respect to employment "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a). The word "sex" is not defined in the statute. Thus, the question before the Court is one of statutory interpretation regarding what it means to discriminate "because of . . . sex." The plain and unambiguous meaning of "sex" in Title VII is biological status as male or female. That meaning is distinct from "sexual orientation," "gender identity," or "transgender status," as Congress's actions since its enactment of Title VII confirm.

A. "When a word is not defined by statute, [this Court] normally construe[s] it in accord with its ordinary or natural meaning." *Smith v. United States*, 508 U.S. 223, 228 (1993); *see also Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995) ("When terms used in a statute are undefined, we give them their ordinary meaning."). Thus, the "first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). If, as here, the statute is clear and unambiguous, courts must give effect to the unambiguously expressed intent of Congress. *Sullivan v. Stroop,* 496 U.S. 478, 482 (1990).

1. Courts, including this Court, traditionally look to general reference dictionaries to ascertain the common meaning of statutory language. *See, e.g., Stroop,* 496 U.S. at 482-83. When Congress enacted Title VII, virtually every dictionary definition of "sex" referred to physiological distinctions between females and males, particularly with respect to their reproductive functions. *See, e.g.*, American Heritage Dictionary 1187 (1976) ("The property or quality by which organisms are classified according to their reproductive functions."); Webster's Third New International Dictionary 2081 (1971) ("[T]he sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change . . . ."); 9 Oxford English Dictionary 578 (1961) ("The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these."). Even today, "sex" continues to refer to biological differences between females and males. *See, e.g.*, Webster's New World College Dictionary 1331 (5th ed. 2014) ("either of the two divisions, male or female, into which persons, animals, or plants are divided, with reference to their reproductive functions").

The uniform definition of "sex" to mean biologically male or female establishes that both Congress and the public would have understood "sex" in that manner when it was included in Title VII. As Judge Sykes noted in her dissent in *Hively v. Ivy Tech Community College of Indiana*, 853 F.3d 339 (7th Cir. 2017) (en

banc), "[i]n common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*." *Id.* at 362 (emphasis in original); *see also, e.g., Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 137 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) ("Of course, today's majority does not contend that Congress literally prohibited sexual orientation discrimination in 1964 . . . . [A]ny such contention would be indefensible."); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 338 (5th Cir. 2019) (Ho, J., concurring) ("The traditional interpretation of Title VII is . . . the only reading that comports with common usage.").

2. For decades, there was a consensus among lower courts that the plain language of Title VII does not prohibit discrimination based on sexual orientation or gender identity. *See, e.g.*, *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255-56 (11th Cir. 2017), *rh'g en banc denied* (July 6, 2017); *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1220-21 (10th Cir. 2007); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762-63 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062-65 (7th Cir. 2003), *overruled by Hively*, *supra*; *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000), *overruled by Zarda*, *supra*; *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *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); *Ulane v. E. Airlines, Inc.*, 742 F.2d 1081, 1084 (7th Cir. 1984); *Sommers v. Budget Mktg., Inc.*, 667 F.2d 748, 749-50 (8th Cir. 1982); *DeSantis v.*

Pacific Tel. & Tel. Co., 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated in part on other grounds by Nichols v. Azteca Restaurant Enterprises, Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979); *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659, 662-63 (9th Cir. 1977). Until recently, moreover, the EEOC agreed with that consensus. *See e.g., Angle v. Veneman*, EEOC Doc. 01A32644, 2004 WL 764265, at *2 (April 5, 2004) (noting that the EEOC had "consistently held that discrimination based on sexual orientation is not actionable under Title VII"); *Loran v. O'Neill*, EEOC Doc. 01A13538, 2001 WL 966123, at *1 (Aug. 17, 2001) ("The Commission has repeatedly found that transsexualism is not a protected basis under Title VII . . . .").

"It was not until 40 years after Congress enacted Title VII that a federal court of appeals first construed it to prohibit transgender discrimination—and 53 years after enactment that a federal court of appeals first construed it to prohibit sexual orientation discrimination. *Wittmer*, 915 F.3d at 336 (Ho, J., concurring) (internal citation omitted). "If the first forty years of uniform circuit precedent nationwide somehow got the original understanding of Title VII wrong, no one has explained how." *Id; see also Hively*, 853 F.3d at 362 (Sykes, J., dissenting) ("Our long-standing interpretation of Title VII is not an outlier. From the statute's inception to the present day, the appellate courts have unanimously and repeatedly read the statute the same way . . . ."). The "unanimity among the courts of appeals strongly suggests" that the "long-settled interpretation" of Title VII to mean

discrimination based on one's biological status as male or female is correct. *Hively*, 853 F.3d at 361 (Sykes, J., dissenting.).

This Court, too, has long interpreted Title VII to prohibit discrimination involving "disparate treatment of *men* and *women*." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (internal quotation marks omitted) (emphasis added); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (explaining that employers may not cause "members of one sex [to be] exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed" (internal quotation marks omitted)). That interpretation comports with a biology-based understanding of the word "sex."

3. Because the cases before the Court present questions of *statutory* interpretation and concern the availability of a specific civil remedy under Title VII, it is the original public meaning of "sex" in Title VII that must guide the Court's analysis, not personal views or public opinion about whether discrimination based on sexual orientation or gender identity *should be* prohibited. *See Hively,* 853 F.3d at 362 (Sykes, J., dissenting) ("But the analysis must begin with the statutory text; it largely ends there too."); *Simonton*, 232 F.3d at 35 ("[W]e are called upon here to construe a statute . . . not to make a moral judgment." (quoting *Higgins*, 194 F.3d at 259)).

Those pressing for a broader interpretation of "sex" to include sexual orientation and gender identity frequently rely on this Court's decision in *Oncale*, which held that same-sex sexual harassment may be

actionable under Title VII if it otherwise "meets the statutory requirements." 523 U.S. at 80. But *Oncale* provides no support for their position. *Oncale* reiterated that "[t]he critical issue, [as] Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." 523 U.S. at 80 (internal quotation marks omitted). Since "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," the Court saw no reason to categorically exclude those claims from Title VII's coverage. *Id.* at 79. "[I]n authorizing claims of same-sex harassment as a theoretical matter," however, "the Court carefully tethered *all* sexual-harassment claims to the statutory requirement that the plaintiff prove discrimination 'because of sex.'" *Hively*, 853 F.3d at 372 (Sykes, J., dissenting) (emphasis in original).

"Nothing in *Oncale* eroded the distinction between sex discrimination" and discrimination based on sexual orientation or gender identity or "opened the door to a new interpretation of Title VII." *Id.* While it is theoretically possible for a male plaintiff to prove that a male employer is harassing him "because of . . . sex," a homosexual plaintiff facing discrimination because of sexual orientation cannot satisfy that statutory requirement. Nor can a transgender plaintiff facing discrimination because of gender identity. For the latter two plaintiffs, the answer to the "critical" question whether "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed,"

Oncale, 523 U.S. at 80 (internal quotation marks omitted), is no. That answer confirms that discrimination based on sexual orientation or gender identity does not violate Title VII.

B. The Sixth Circuit intermingled the terms "gender identity," "transgender," and "transitioning status," with "sex." Likewise, the Second Circuit held that "sexual orientation" discrimination is a subset of "sex" discrimination. But the terms "sexual orientation" and "gender identity" are not synonymous with "sex"; rather, they have consistently been used *in contrast with* the word "sex."

In the 1950s, John Money, a psychologist at Johns Hopkins University, introduced "gender"—previously a grammatical term only—into scientific discourse. Joanne Meyerowitz, *A History of "Gender,"* 113 The American Historical Review 1346, 1354 (2008). Money believed that an individual's "gender role" was not determined at birth but was acquired early in a child's development much in the same fashion that a child learns a language. John Money et al., *Imprinting and the Establishment of Gender Role*, 77 A.M.A. Archives of Neurology & Psychiatry 333-36 (1957).

Robert Stoller, the UCLA psychoanalyst who first used the term "gender identity," was another early adopter of the terminology of "gender." He wrote in 1968 that gender had "psychological or cultural rather than biological connotations." Robert J. Stoller, Sex and Gender: On the Development of Masculinity and Femininity 9 (1968). To him, "sex was biological but gender was social." David Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in*

Academic Titles, 1945–2001, Archives of Sexual Behavior, Apr. 2004, at 93.

Early users of "gender identity"—a term first introduced around 1963—distinguished it from "sex" on the ground that "gender" is "primarily culturally determined." Haig, *supra*, at 93 (internal quotation marks omitted). "Biological sex," they contended, is not the same as "societally assigned gender." *Id.* (quoting Ethel Tobach, *Some Evolutionary Aspects of Human Gender*, 41 Am. J. of Orthopsychiatry 710 (1971)). On this view, while "sex" cannot be changed, "gender" is more fluid.

In 1969, Virginia Prince, who is credited with coining the term "transgender," echoed the view that "sex" and "gender" are distinct: "I, at least, know the difference between sex and gender and have simply elected to change the latter and not the former. . . . I should be termed 'transgenderal.'" Federal Government on Autopilot: Delegation of Regulatory Authority to an Unaccountable Bureaucracy: Hearing Before the H. Comm. on the Judiciary, 114th Cong. 13 (2016) (statement of Gail Heriot, Member, U.S. Comm'n on Civil Rights) (quoting Virginia Prince, *Change of Sex or Gender*, 10 Transvestia 53, 60 (1969)). And in the 1970s, other feminist scholars similarly defined "sex as biological and gender as psychological and cultural." Haig, *supra*, at 93.

This differentiation of "sex" from "gender" has continued to this day. For example, Oxford defines "sex" in biological terms as "[e]ither of the two main categories (male and female) into which humans and most other living things are divided on the basis of

their reproductive functions." *Sex*, Lexico, https://www.lexico.com/en/definition/sex. But "gender" means "[e]ither of the two sexes . . . when considered with reference to social and cultural differences rather than biological ones." *Gender*, Lexico, https://www.lexico.com/en/defintion/gender; *see also* Sari L. Reisner et al., *"Counting" Transgender and Gender-Nonconforming Adults in Health Research*, Transgender Stud. Q., Feb. 2015, at 37 ("*Sex* refers to biological differences among females and males, such as genetics, hormones, secondary sex characteristics, and anatomy. . . . *Gender* typically refers to cultural meanings ascribed to or associated with patterns of behavior, experience, and personality that are labeled as feminine or masculine. (emphasis in original)).

There is thus no ambiguity in Title VII's use of the term "sex." Sex is, and has always been, understood as distinct from sexual orientation and gender identity. Indeed, these two concepts can even be defined without reference to one another; for example, describing someone as homosexual or heterosexual tells the listener nothing about whether that person is male or female.

It follows that, at the time Congress enacted Title VII, "sex," "sexual orientation," and "gender identity" had different meanings. As a result, the word "sex" in Title VII cannot be fairly construed to mean or include "sexual orientation" or "gender identity." The Second Circuit and the Sixth Circuit erroneously conflated these terms to redefine and broaden Title VII beyond its congressionally intended scope.

C. Legislative efforts postdating Title VII's enactment in 1964 confirm that Title VII does not prohibit discrimination based on sexual orientation or gender identity. Those efforts include failed attempts to add the terms "sexual orientation" and "gender identity" to Title VII and to enact new legislation prohibiting those forms of discrimination, as well as the successful enactment of other legislation specifically including the terms "sexual orientation" and "gender identity."

1. Members of Congress introduced numerous bills during the 1970's to amend Title VII to prohibit discrimination based on sexual orientation. In 1974, Representative Bella Abzug proposed to amend the Civil Rights Act to prohibit a new category of discrimination based on "sexual orientation." H.R. 14752, 93rd Cong. (1974). Similar bills were considered in the years that followed. *See, e.g.*, H.R. 166, 94th Cong. (1975); H.R. 2074, 96th Cong. (1979); S. 2081, 96th Cong. (1979). Had Title VII's prohibition on discrimination because of "sex" already been understood to prohibit those forms of discrimination, those efforts of course would have been unnecessary.

In 1994, lawmakers introduced the Employment Non-Discrimination Act ("ENDA") which, like Representative Abzug's earlier effort, reflected the understanding that Title VII's prohibition of "sex" discrimination related only to one's biological status as male or female. *See* H.R. 4636, 103rd Cong. (1994). In 2007, 2009, 2011, and 2013, lawmakers proposed a broader version of ENDA to codify protections for "sexual orientation" and "gender identity" in the

employment context. *See* H.R. 2015, 110th Cong. (2007); H.R. 3017, 111th Cong. (2009); H.R. 1397, 112th Cong. (2011); H.R. 1755, 113th Cong. (2013). Each of these failed attempts confirms Congress's enduring understanding that "sex" means biologically male or female.

The one instance when Congress amended Title VII to clarify the meaning of discrimination "because of . . . sex" reinforces this understanding. In 1978, Congress amended Title VII to provide that discrimination "because of sex" includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions" and to ensure that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes" as other persons. Pregnancy Discrimination Act of 1978, Pub. L. No. 95- 555, § (k), 92 Stat. 2076, 2076 (1978). Congress's prohibition of pregnancy discrimination, which stems from the biological differences between men and women, is further evidence that it understood "sex" to mean biologically male or female.

Congress's enactment of Title IX eight years after the passage of Title VII also sheds light on the meaning of "sex." Title IX prohibits discrimination on the basis of "sex" in federally funded education programs. 20 U.S.C. § 1681(a). The debate over Title IX centered on invidious "sex" discrimination and ensuring women equal access to education. Lawmakers used the term "sex discrimination" repeatedly (not "gender identity" or "sexual orientation" discrimination), as referring to the biological distinction between men and women. *See*

117 Cong. Rec. 30406 (1971); 118 Cong. Rec. 5807 (1972). Absent from Title IX's statutory text or legislative history is any mention of "sexual orientation" or "gender identity."

In fact, Title IX includes a provision specifying that the prohibition on sex discrimination should not be construed "to prohibit any educational institution receiving funds under this Act, *from maintaining separate living facilities for the different sexes*." 20 U.S.C. § 1686 (emphasis added). Congress's inclusion of the word "different" before "sexes" signals that it was referring to the two biological sexes. And because "identical words used in different parts of the same act are intended to have the same meaning," *Stroop*, 496 U.S. at 484 (internal quotation marks omitted), this confirms that Title IX's prohibition on the basis of "sex," just like Title VII's similar prohibition, means discrimination based on biological status as male or female.

2. Not only has Congress declined to prohibit sexual orientation and gender identity discrimination in the Title VII context, it has affirmatively included those categories in other antidiscrimination statutes. The 2013 reauthorization of the Violence Against Women Act, for instance, prohibits recipients of certain federal grants from invidiously discriminating based on "sex," as well as "gender identity" and "sexual orientation." 34 U.S.C. § 12291(b)(13)(A). And in 2010, the President signed hate crimes legislation that applies to crimes motivated by, inter alia, "sexual orientation," "gender," and "gender identity." 18 U.S.C. § 249(a)(2). Congress's express inclusion of "sexual orientation" and

"gender identity" in other statutes is further evidence that "sex" means biologically male or female.[2]

* * *

In sum, Congress knew what it was—and was not—doing when it enacted Title VII's prohibition against discrimination based on sex. Until the Seventh Circuit's decision in *Hively*, the Courts of Appeals had uniformly held that discrimination based on "sex" meant only discrimination based on whether an employee is biologically male or female. This understanding was shared by Congress and ratified through its decades of acquiescence. Congress has declined to expand Title VII to include sexual orientation and gender identity discrimination. That should be the end of the inquiry. *See Wittmer*, 915 F.3d at 338 (Ho, J., concurring) ("It would defy common sense to imagine that lawmakers labored to assemble a majority coalition to eradicate sexual orientation and transgender discrimination from the workplace—only

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[2] State and local antidiscrimination laws likewise expressly include "sexual orientation" and "gender identity" as prohibited categories of discrimination. *See Hively*, 853 F.3d at 364 (Sykes, J., dissenting) ("State and local antidiscrimination laws likewise distinguish between sex discrimination and sexual-orientation discrimination by listing them separately as distinct forms of unlawful discrimination."); Amicus Brief for States of Illinois et al. as Amici Curiae in Support of the Employees at 14 ("Twenty-one States and the District of Columbia have *expressly* prohibited discrimination on the basis of sexual orientation and transgender status by statute or regulation." (emphasis added)). "This uniformity of usage is powerful objective evidence" that sexual-orientation and gender-identity discrimination are "independent categor[ies] of discrimination and [are] not synonymous with sex discrimination." *Hively*, 853 F.3d at 364-65 (Sykes, J., dissenting).

to select the most oblique formulation they could think of ('because of sex') and then hope for the best that courts would understand what they meant.").

Whether this Court looks only to the language and its context in Title VII or considers the relevant legislative history and purpose expressed in the statute, it is clear that the term "sex" in Title VII does not mean or include sexual orientation or gender identity.

II. Discrimination Based on Sexual Orientation or Gender Identity Is Not Sex Stereotyping and Is Not Analogous to Anti-miscegenation Laws.

Proponents of construing Title VII to prohibit discrimination based on sexual orientation or gender identity contend that such discrimination constitutes sex stereotyping under *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (plurality opinion). They also argue that discrimination based on sexual orientation is analogous to the anti-miscegenation law this Court invalidated in *Loving v. Virginia*, 388 U.S. 1 (1967). Those arguments should be rejected.

A. The argument that discrimination based on sexual orientation or gender identity necessarily constitutes sex stereotyping rests on a fundamental misunderstanding of *Price Waterhouse*. This Court granted review in *Price Waterhouse* to resolve "a conflict . . . concerning the respective burdens of proof of a defendant and a plaintiff in a suit under Title VII when it has been shown that an employment decision resulted from a mixture of legitimate and illegitimate

motives." 490 U.S. at 232. On that issue, the plurality held that "once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role." *Id.* at 244-45.

Because the evidence of discrimination in that case included evidence of sex stereotyping, and Price Waterhouse had at least insinuated that such stereotyping "lack[ed] legal relevance," the plurality also clarified that evidence of sex stereotyping can indeed be relevant to the ultimate question whether an employer discriminated because of sex. *Id.* at 250-51. Title VII's prohibition on discrimination because of sex, the plurality explained, was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* at 251 (quoting *L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). For example, it was intended to "lift[] women out of th[e] bind" created by "[a]n employer who objects to aggressiveness in women but whose positions require this trait." *Id.*

But the plurality did not—and did not purport to—create an independent cause of action for sex stereotyping. *Id.* at 294 (Scalia, J., dissenting) (finding it "important to stress that Title VII creates no independent cause of action for sex stereotyping"). Rather, sex stereotyping is actionable under Title VII only if it constitutes discrimination "because of . . . sex."

1. Discrimination based on sexual orientation, however, is not *sex* stereotyping at all, let alone the kind of sex stereotyping that could support a Title VII claim. To the extent that discrimination based on sexual orientation involves stereotyping, it involves the belief or expectation that all persons, whether male or female, are or should be heterosexual. As Judge Sykes explained, "heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all." *Hively*, 853 F.3d at 370 (Sykes, J., dissenting) (emphasis in original). An employer "who hires only heterosexual employees" is simply "insisting that his employees match the dominant sexual orientation *regardless of their sex*." *Id.* (emphasis in original).

Because discrimination based on sexual orientation is not a sex-specific stereotype, it does not result in the "disparate treatment of men and women" that Title VII was intended to prohibit. *Price Waterhouse*, 490 U.S. at 251. Whereas the refusal to hire aggressive women "place[d] women in an intolerable and impermissible catch 22" and thereby systematically disadvantaged them, *id.* at 251, the refusal to hire homosexuals does not disadvantage any particular sex.

To be sure, if an employer were to apply an otherwise sex-neutral stereotype in a sex-discriminatory manner—for example, by hiring male homosexual employees but not female homosexual employees—then that could give rise to an inference of sex discrimination. In that situation, the employee's *sex*—not sexual orientation—would be the basis for differential treatment. *Cf. Phillips v. Martin Marietta*

Corp., 400 U.S. 542, 543 (1971) (per curiam) (employer could not refuse applications from women with preschool-age children while hiring men with preschool-age children). But there is no allegation of that kind in the cases before the Court.

2. Discrimination based on gender identity is not sex stereotyping either. To the extent that discrimination based on gender identity involves stereotyping, it is the belief or expectation that all persons, whether male or female, identify or should identify with the gender that corresponds to their biological sex. But that is not a stereotype that is specific to males or females. And because it is not a sex-specific stereotype, it does not result in the disparate treatment of men and women and is not prohibited by Title VII.

3. The Second Circuit and Sixth Circuit acknowledged that discrimination based on sexual orientation or gender identity does not disadvantage a particular sex, but they nevertheless found such discrimination actionable under Title VII because it requires an employer to *consider* the employee's biological sex.

But Title VII does not prohibit employers from merely considering an employee's sex; it prohibits them from discriminating against an employee *because of* that employee's sex. As Justice O'Connor explained in her concurring opinion in *Price Waterhouse*, "gender always 'play[s] a role' in an employment decision in the benign sense that [it is a] human characteristic[] of which decisonmakers are aware and about which they may comment in a perfectly neutral and

nondiscriminatory fashion." 490 U.S. at 277 (O'Connor, J., concurring in the judgment). An employer who considers an employee's sex in determining whether the employee is transgender, and then fires the employee because he is transgender, has discriminated based on gender identity—not sex.

On the view of the Second Circuit and Sixth Circuit that an employer must be completely blind to an employee's sex, employers could not even maintain sex-segregated restrooms or locker rooms, even though they are "of course ubiquitous in our society." *Wittmer*, 915 F.3d at 334 (Ho, J., concurring); *see also id.* at 337 ("No one . . . has suggested how the blindness theory of Title VII could prohibit transgender and sexual orientation discrimination, while still allowing employers to maintain separate bathrooms for men and women."). That view must be rejected. It lacks any basis in the statutory text and would radically transform Title VII. *See id.* at 338 (predicting that the "blindness approach to Title VII" would bring about "revolutionary social change").

B. The argument that sexual orientation discrimination is analogous to the anti-miscegenation law this Court invalidated in *Loving* is similarly untenable. In *Loving*, this Court held that a law making it a crime for a "white person" to marry a "colored person" violated the Equal Protection Clause. 388 U.S. at 4. It reached that conclusion because the law at issue contained facial racial classifications and could be justified only as an act of "invidious racial discrimination . . . . designed to maintain White Supremacy." *Id.* at 11. Because anti-miscegenation

laws sought to confine black people to "a position of inferiority," Charles Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 424 (1960), such laws represented "a product of bigotry against a single race by another." *Zarda*, 883 F.3d at 159 (Lynch, J., dissenting). In other words, "*Loving* rests on the inescapable truth that miscegenation laws are inherently racist." *Hively*, 853 F.3d at 368 (Sykes, J., dissenting); *see also Zarda*, 883 F.3d at 158 (Lynch, J., dissenting) (prohibitions on "race-mixing" were "an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites").

Lower courts have held that anti-miscegenation policies in the employment context constitute discrimination "because of . . . race" within the meaning of Title VII. *See, e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009); *Holcomb v. Iona Coll.*, 521 F.3d 130, 139 (2d. Cir. 2008). That extension makes sense: Anti-miscegenist employment policies "share the same contextual foundation" as the law invalidated in *Loving*. *Hively*, 853 F.3d at 368 (Sykes, J., dissenting). They are prohibited not because they require employers to consider race, but because they are inherently racist.

"Sexual orientation discrimination, on the other hand, is not inherently *sexist*." *Id.* (emphasis in original). An employer who discriminates based on sexual orientation does not do so because of animus toward or a desire to oppress males or females. Nor does sexual orientation discrimination have the effect of disadvantaging one sex or the other. Discrimination

based on sexual orientation is not discrimination "because of . . . sex" and does not result in the disparate treatment of males and females, and, therefore, Title VII does not prohibit discrimination based on sexual orientation.

Common usage confirms the point. Suppose, for example, that a corporation hired men and women equally, yet refused to hire homosexuals. No one would call that company "sexist." Rather, that corporation would be called "homophobic." *Cf. Wittmer*, 915 F.3d at 338 (Ho, J., concurring) ("When asked about a hypothetical company that hires equally between men and women, but refuses to hire any transgender men or women, counsel agreed that, as a matter of common parlance, we would call that company today transphobic, not sexist.").

III. The Constitutional-Doubt Canon Requires the Court to Read "Sex" Narrowly.

If plain meaning and history were not enough, there is yet another reason to confine "sex" to its ordinary and normal meaning, which is a narrow one. If plaintiffs are correct that "sex" in Title VII broadly includes "sexual orientation" and "gender identity," that would raise a serious constitutional question about whether Title VII effects a valid abrogation of state sovereign immunity under section 5 of the Fourteenth Amendment. Under the constitutional-doubt canon, the Court should avoid that question by cabining "sex" to its most natural narrow meaning.

A. Section 5 of the Fourteenth Amendment grants Congress the power to abrogate state sovereign

immunity under limited circumstances. *Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80 (2000); *see also City of Boerne v. Flores*, 521 U.S. 507, 517 (1997) ("It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment." (cleaned up)). Congress relied on this power when it amended Title VII in 1972 "to bring the States within its purview." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 449 (1976).

But section 5's "affirmative grant of congressional power" is tightly limited to enforcing the Constitution's requirements, not defining them. *Kimel*, 528 U.S. at 81. And "the determination whether purportedly prophylactic legislation constitutes appropriate remedial legislation, or instead effects a substantive redefinition of the Fourteenth Amendment right at issue, is often difficult." *Id.* (citing *Flores*, 521 U.S. at 519-20). While the line between remedial legislation and a substantive redefinition is not always clear, this Court has held that there "must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Flores*, 521 U.S. at 520.

Applying that "congruence and proportionality" test, the Court declared in 1997 that the Religious Freedom Restoration Act ("RFRA") is not appropriate legislation under section 5. *Id.* at 531-34. The Court explained that "the legislative record contained very little evidence of the unconstitutional conduct purportedly targeted by RFRA's substantive provisions." *Kimel*, 528 U.S. at 81-82. In particular, "Congress had uncovered only 'anecdotal evidence' that, standing

alone, did not reveal a 'widespread pattern of religious discrimination in this country.'" *Id.* at 82 (quoting *Flores*, 521 U.S. at 531). In addition, RFRA was "so out of proportion to a supposed remedial or preventive object that it cannot be understood as responsive to, or designed to prevent, unconstitutional behavior." *Flores*, 521 U.S. at 532.

Two years later, the Court applied the "congruence and proportionality" test again to the Patent Remedy Act. *See Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Savings Bank*, 527 U.S. 627 (1999). The Court held that statute did not validly abrogate state sovereign immunity under section 5 largely because "Congress identified no pattern of patent infringement by the States, let alone a pattern of constitutional violations." *Id.* at 640. The Court later explained that "because it was unlikely that many of the acts of patent infringement affected by the statute had any likelihood of being unconstitutional, . . . the scope of the Act was out of proportion to its supposed remedial or preventive objectives." *Kimel*, 528 U.S. at 82.

For similar reasons, in *Kimel*, the Court concluded that the Age Discrimination in Employment Act is not "appropriate legislation" under section 5. *Id.* at 83. The Court reasoned that it had considered claims of unconstitutional age discrimination under the Equal Protection Clause three times, and each time it found no constitutional violation. *Id.* Age is not a suspect classification, and so the Equal Protection Clause does not prohibit "States' reliance on broad generalizations with respect to age." *Id.* at 84-85.

The Court thus has frequently applied the "congruence and proportionality" test to reject federal efforts to abrogate state sovereign immunity. As *Flores*, *Florida Prepaid*, and *Kimel* illustrate, such abrogation is permissible only in rare circumstances to redress a "widespread pattern" of unconstitutional discrimination by the States in violation of the Constitution's plain text and as documented in congressional findings. *Kimel*, 528 U.S. at 90; *see also Flores*, 521 U.S. at 520.

B. A serious constitutional question exists as to whether Title VII could validly abrogate state sovereign immunity as to claims of discrimination based on sexual orientation or gender identity. The Court should not invite that question; the proper course is to construe Title VII in a way that avoids that issue.

1. The constitutional-doubt canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). The canon provides: "[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 247 (2012) (quoting *United States ex rel. Att'y Gen. v. Del. & Hudson Co.*, 213 U.S. 366, 408 (1909)). This Court has explained that "one of the canon's chief justifications is

that it allows courts to avoid the decision of constitutional questions." *Clark*, 543 U.S. at 381 (emphasis omitted).

The canon "goes much further than" a mere presumption that a statute is valid. Scalia & Garner, *supra*, at 247. "It militates against not only those interpretations that would render the statute unconstitutional but also those that would even raise serious questions of constitutionality." *Id.* at 247-48. The canon rests "upon a judicial policy of not interpreting ambiguous statutes to flirt with constitutionality, thereby minimizing judicial conflicts with the legislature." *Id.* at 249.

2. If "sex" in Title VII is read to forbid discrimination based upon sexual orientation or gender identity, it will necessarily present very difficult questions about whether Title VII's abrogation of sovereign immunity is constitutional. Application of the constitutional-doubt canon to construe Title VII narrowly avoids those questions altogether, as the canon is designed to do.

In enacting Title VII, "Congress never identified any pattern of" sexual-orientation or gender-identity "discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation." *Kimel*, 528 U.S. at 89. Indeed, it is unclear even where the constitutional line is as to this issue. *See, e.g.*, *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001) ("Once we have determined the metes and bounds of the constitutional right in question, we examine whether Congress identified a history and pattern of

unconstitutional employment discrimination by the States . . . ."); *United States v. Virginia*, 518 U.S. 515, 540 (1996) (finding no constitutional problem with providing different "housing assignments and physical training programs for female cadets" at VMI); *United States v. Windsor*, 570 U.S. 744, 792-93 (2013) (Scalia, J., dissenting) (noting unresolved questions).

It is clear "that Congress had no reason to believe that broad prophylactic legislation was necessary in this field." *Kimel*, 528 U.S. at 91. Indeed, "the indiscriminate scope of the [the Civil Rights Act's] substantive requirements," combined with "the lack of evidence of widespread and unconstitutional [sexual-orientation or gender-identity] discrimination by the States," provides ample reason to doubt that Title VII could validly abrogate state sovereign immunity under section 5. *Id.*

It makes no difference that Title VII's abrogation may be valid as applied to actual constitutional violations. *See United States v. Georgia*, 546 U.S. 151, 158-59 (2006). It is irrelevant whether the constitutionality of an abrogation provision is to be determined on an as-applied basis, because the constitutional-doubt canon is not a method to determine the constitutionality of anything. Rather, "it allows courts to avoid the decision of constitutional questions." *Clark*, 543 U.S. at 381 (rejecting dissent's complaint that the canon "effect[s] an end run around black-letter constitutional doctrine governing facial and as-applied constitutional challenges") (internal quotation marks omitted)). Any evaluation of Title VII's abrogation as applied to accusations of

unconstitutional discrimination based on sexual orientation and gender identity would also necessarily raise difficult constitutional questions.[3]

Nor does it matter that the constitutionality of Title VII's abrogation is not at issue in this case. This Court has endorsed adopting a limiting construction of one of a statute's applications, "even though other of the statute's applications, standing alone, would not support the same limitation." *Clark*, 543 U.S. at 380. That is because "[t]he lowest common denominator, as it were, must govern." *Id.* Simply put, if one possible statutory construction "would raise a multitude of constitutional problems, the other should prevail—*whether or not* those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81 (emphasis added).

In short, a broad reading of "sex" would raise serious and difficult constitutional questions about Title VII's abrogation of state sovereign immunity. The Court should avoid those problems altogether by

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[3] *Georgia*'s "surgical severing" of Title II of the ADA's abrogation provision to limit it to actual constitutional violations, Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 Cal. L. Rev. 915, 957-58 (2011), is contrary to earlier decisions evaluating abrogation on a facial, rather than as-applied, basis. *See, e.g.*, *Kimel*, 528 U.S. at 91-92; *Fla. Prepaid*, 527 U.S. 637-48. Indeed, in *Florida Prepaid*, the Court relied on Congress's failure "to limit the coverage of the Act to cases involving arguable constitutional violations" as a basis to strike the Act's abrogation *in toto*. 527 U.S. at 646. At the very least, the proper mode of reviewing Title VII's abrogation is another difficult constitutional question that will arise if petitioners prevail.

reading "sex" narrowly, as the constitutional-doubt canon requires in these circumstances.

IV. Construing Title VII to Prohibit Discrimination Based on Sexual Orientation or Gender Identity Would Trespass on Congress's Policymaking Role.

It is the job of Congress, not this Court or the lower federal courts, to write the laws. *See, e.g.*, *SAS Inst. Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("It is Congress's job to enact policy and it is this Court's job to follow the policy Congress has described."). There is a reason for that design. "Article I's precise rules of representation, member qualifications, bicameralism and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Loving v. United States*, 517 U.S. 748, 757-58 (1996). As the branch most responsive to the people, Congress is in the best position to decide "what competing values will or will not be sacrificed to the achievement of a particular objective." *Rodriguez v. United States*, 480 U.S. 522, 526 (1987). Indeed, such decisions are the "very essence of legislative choice." *Id.*

"[N]o legislation pursues its purposes at all costs," *id.*, and federal antidiscrimination laws are no exception. Title VII reflects a "balance between employee rights and employer prerogatives." *Price Waterhouse*, 490 U.S. at 243; *see also id.* at 242 (noting that an "important aspect of the statute is its preservation of an employer's remaining freedom of choice"). Because Congress was "unwilling[] to require employers to change the very nature of their operations in response to the statute," *id.* at 242, for example,

Title VII allows employers to discriminate based on "religion, sex, or national original in those certain instances where religion, sex, or national origin is a bona fide occupational qualification." 42 U.S.C. § 2000e-2(e). Title VII also exempts religious entities from its prohibition on religious discrimination. *See* 42 U.S.C. § 2000e-1(a).

Title IX, which prohibits discrimination "on the basis of sex" by educational institutions that receive federal funding, 20 U.S.C. § 1681(a), is replete with exceptions that reflect an attempt to balance competing interests. For example, Title IX's prohibition on sex discrimination does not apply to educational institutions "controlled by a religious organization" to the extent application would be inconsistent with that organization's "religious tenets," *id.* § 1681(a)(3), or to the membership practices of the Boy Scouts and Girl Scouts and similar organizations, *id.* § 1681(a)(6)(B). And Congress specified that the statute should not be construed to prohibit schools "from maintaining separate living facilities for the different sexes." *Id.* § 1686.

The policy decision whether to prohibit discrimination based on sexual orientation and gender identity involves not just that principal question, but also a host of subsidiary choices about how to balance the competing interests at stake. Legislative efforts at the state level illustrate this point. In Utah, for example, at the same time the legislature added "sexual orientation" and "gender identity" as prohibited bases of employment discrimination, it expanded protections for religious liberty and specified that

employers could maintain "reasonable dress and grooming standards" and "sex-specific facilities" as long as employers afford reasonable accommodations based on gender identity. Utah Code Ann. § 34A-5-106(1)(a)(1)(I)-(J); *id.* §§ 34A-5-109 to -112.

The decision whether to extend Title IX to prohibit discrimination based on sexual orientation and gender identity is particularly fraught with sensitive issues. If a school separates students by sex on overnight field trips, which is allowed under 20 U.S.C. § 1686, must a transgender student's assignment correspond to the student's gender identity? How about college dormitories? May a university take into account a student's sexual orientation when making housing assignments? And what about athletics? Must a school allow a biologically male student who identifies as a female to participate on a women's sports team?

The point of this discussion is not to suggest how these questions should be answered; it is to urge this Court to allow *Congress* to answer them. When a federal court, under the guise of statutory interpretation, rewrites a federal statute, it trespasses on Congress's policymaking authority. And that trespass is particularly egregious when the policy choices are "as sensitive as those implicated" in these cases. *Harris v. McRae*, 448 U.S. 297, 326 (1980) (quoting *Maher v. Roe*, 432 U.S. 464, 479 (1977)). The "appropriate forum for their resolution in a democracy is the legislature," not this Court. *Id.* (quoting *Maher*, 432 U.S. at 479).

And there should be no doubt that trespass is exactly what the plaintiffs ask this Court to do. Judge

Posner, concurring in *Hively*, candidly admitted as much. He acknowledged the "certain[ty] that homosexuality, male or female, did not figure in the minds of the legislators who enacted Title VII." 853 F.3d at 353. As a result, he admitted that the *Hively* majority—which he joined—was doing nothing more than "rewriting Title VII." *Id.* at 354. He acknowledged that the plaintiffs' aim in these cases is to "impos[e] on a half-century-old statute a meaning of 'sex discrimination' that the Congress that enacted it would not have accepted," and he obliged them "to avoid placing the entire burden of updating old statutes on the legislative branch." *Id.* at 357. This Court should not countenance "the circumvention of the legislative process by which the people govern themselves." *Id.* at 360 (Sykes, J., dissenting).

States are uniquely harmed when the Court impinges on Congress's policymaking authority. Judicial rewriting circumvents the strictures of Article I that encourage deliberative and responsive lawmaking, including requirements like bicameralism that are designed to protect state interests and ensure consideration of state prerogatives. *See, e.g.*, Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1328-29, 1343-44 (2001); Herbert Wechsler, *The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government*, 54 Colum. L. Rev. 543, 546-48 (1954). Moreover, judicial rewriting that extends a statute beyond its plain language to regulate to a greater degree than Congress intended could impede state policymaking efforts, which are likely to be more responsive to local interests and

concerns than a federal solution. The features of the legislative process that have prompted some to seek social change from the federal judiciary instead of Congress—procedures that "often seem clumsy, inefficient, even unworkable," *I.N.S. v. Chadha*, 462 U.S. 919, 959 (1983)—also protect federalism by ensuring that national policy will not too easily displace state and local policies. *See* Clark, *supra*, at 1323-25.

"[W]hatever its virtues or vices, Congress's prescribed policy here is clear[.]" *SAS*, 138 S. Ct. at 1358. Title VII prohibits discrimination "because of . . . sex," not sexual orientation or gender identity. This Court's role is to follow that policy unless and until Congress changes it.

CONCLUSION

Amici States urge this Court to hold that Title VII does not prohibit discrimination based on sexual orientation or gender identity.

Respectfully submitted,

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