NO. _____

In the Supreme Court of the United States

ALTITUDE EXPRESS, INC., *et al.*,
Petitioners,

v.

MELISSA ZARDA, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

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

PARTIES TO THE PROCEEDING

Petitioners, defendants below, are Altitude Express, Inc., formerly doing business as Skydive Long Island, and Ray Maynard.

Respondents, plaintiffs below, are 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.

RULE 29.6 STATEMENT

Petitioner, Altitude Express, Inc., formerly doing business as Skydive Long Island, was a business corporation organized and existing under the laws of the State of New York. It was not a government entity, there were no parent corporations, nor did any publicly held corporation hold 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners, Altitude Express, Inc., formerly doing business as Skydive Long Island, and Ray Maynard (collectively, "Petitioners"), respectfully petition this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The *en banc* opinion of the United States Court of Appeals for the Second Circuit (App. 1-140) is published at 883 F.3d 100. The *per curium* opinion of the Appellate Court (App. 141-153) is published at 855 F.3d 76. The order of the District Court (App. 154-156) is published at 855 F.3d 76.

JURISDICTION

The judgment of the court of appeals was entered on February 26, 2018. (App. 1-140). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISION

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) ("Title VII), provides in pertinent part: "It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise 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."

STATEMENT OF THE CASE

I. THE UNDERLYING EVENTS

In the summer of 2010, Rosanna Orellana ("Orellana") and her boyfriend, David Kengle ("Kengle"), went skydiving at Altitude Express. App. 11-12, 144-45. Each purchased tandem skydives, in which the instructor is strapped hip-to-hip and shoulder-to-shoulder with the client so that the instructor can deploy the parachute and supervise the jump. Donald Zarda was Orellana's instructor.[1] *Id*. at 144-45.

At some point during the experience, Zarda informed Orellana that he was homosexual and "ha[d] an ex-husband" *Id.* at 12, 145. After a successful skydive, Orellana told Kengle that Zarda had inappropriately touched her in a flirtatious manner and disclosed his sexual orientation in an effort to excuse his otherwise inappropriate behavior. *Id.* at 12. Zarda alleges that he often informed female clients of his sexual orientation to allay any awkwardness that they may have felt about being strapped to a man for a tandem skydive. *Id*. at 145. Upon hearing about Zarda's inappropriate touching, Kengle called Altitude

[1] Donald Zarda died in a skydiving accident after the District Court awarded partial summary judgment to Petitioners, but prior to trial on his remaining claims. The executors of his estate were substituted in his place. App. at 8. Zarda and the executors of his estate are referred to collectively as "Zarda".

Express and its owner, Ray Maynard, to complain. *Id*. at 12. Zarda, who had a history of similar complaints of inappropriate behavior, was terminated shortly thereafter. *Id*. at 145.

One (1) month after being terminated, Zarda filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"). *Id*. at 12. In his EEOC charge, Zarda stated "[he was] not making this charge on the grounds that [he] was discriminated on the grounds [*sic*] of [his] sexual orientation. Rather . . . in addition to being discriminated against because of [his] sexual orientation, [he] was also discriminated against because of [his] gender." *Id.* at 14-15. Moreover, Zarda 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." *Id.* at 12.

II. THE DISTRICT COURT PROCEEDINGS

On September 23, 2010, Zarda brought suit in the United States District Court for the Eastern District of New York alleging, *inter alia*, sex stereotyping in violation of Title VII and sexual orientation discrimination in violation of the New York State

Human Rights Law, NY EXEC. LAW § 296, *et seq*. ("NYSHRL").[2] App. 144. Citing to *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), *overruled by Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018), Petitioners moved for summary judgment. *Id.* at 12-13. On March 28, 2014, the District Court (Bianco, J.) determined that there was a genuine dispute of material fact regarding the reason for Zarda's termination and concluded that Zarda was entitled to a trial limited to his pending state-law cause of action. *Id*. at 13. By contrast, Zarda's Title VII claim was dismissed because he failed to establish a *prima facie* case of sex stereotyping discrimination under Title VII. *Id*. Notably, in an oral decision the District Court rejected Zarda's familiar sex stereotyping argument, stating, "[t]here's simply no evidence to believe that that stereotype was motivating Mr. Maynard in this situation. There's no, for example there's no evidence of comments, there's no female comparators who were treated differently. There is literally nothing to support that theory." App. at 162. In fact, Zarda had testified under oath that he was "masculine in appearance." App. at 164.

While Zarda's remaining claims were still pending, the EEOC issued its decision in *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015). In *Baldwin*, the EEOC took the position that "allegations of discrimination on the basis

[2] Zarda also alleged violations of state and federal laws related to overtime and minimum wage. App. 144. Although nongermane to the issues herein, Zarda's overtime and minimum wage claims were ultimately dismissed. App. at 154, 169.

of sexual orientation necessarily state a claim of discrimination on the basis of sex." 2015 WL 4397641 at *10. In so holding, the EEOC identified three (3) ways for a claimant 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 "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. Third, 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 after the publication of *Baldwin*, Zarda moved to have his Title VII claim reinstated. App. at 14. The District Court denied the motion, concluding that *Simonton*, *supra*, remained binding precedent and barred Zarda from recovering on a theory that discrimination based on sexual orientation violated Title VII. *Id*.

All facts forming the basis of Zarda's putative sexual orientation claim arising under Title VII were tried before a jury of his peers within the context of the

NYSHRL.[3] *Id*. Upon the completion of a fair and proper trial, Zarda's remaining claims were determined to be unfounded and dismissed with prejudice. *Id.* at 154-55. Zarda appealed.

III. THE APPELLATE PROCEEDINGS

On April 18, 2017, a unanimous panel of the Second Circuit affirmed, i*nter alia*, the District Court's holding in regard to Zarda's Title VII claim. *Id*. at 153. The *per curium* panel noted that Zarda did not appeal the trial court's determination that he failed to establish the requisite proximity between his termination and his failure to conform to sex stereotypes. *Id*. at 150. Rather, Zarda requested that the Second Circuit reconsider its long-held interpretation of Title VII to now hold the statute's prohibition on discrimination based on "sex" encompasses discrimination based on "sexual orientation". *Id*. at 144. The panel, however, declined to revisit *Simonton*, *supra*, stating that Second Circuit precedent could only be overturned by a decision of the court sitting *en banc*. *Id*. at 149.

Zarda petitioned the Second Circuit for a rehearing *en banc*. His petition was granted by a majority of the active judges of the Circuit Court. *Id*. at 156-57. Consequently, the parties were instructed to brief only the following question: "Does Title VII of the Civil Rights Act of 1964 prohibit sexual orientation through

[3] Notably, Zarda's gender stereotyping claims brought under the NYSHRL were subject to the identical analysis as those brought under Title VII. *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 n. 10 (2d Cir. 2011); *Zambrano-Lamhaouhi v. New York City Bd. Of Educ.*, 866 F. Supp. 2d 147, 159 (E.D.N.Y. 2011).

its prohibition of discrimination 'because of . . . sex'?". *Id.* at 157.

On February 26, 2018, the *en banc* decision of the Second Circuit vacated the District Court's judgment on Zarda's Title VII claim and remanded the case for further proceedings. App. at 61.[4] Overturning *Simonton*, *supra*, the *en banc* majority held that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination for purposes of Title VII. *Id.* at 20. The *en banc* majority did not contest the principle "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 23, 137. Rather, the majority breaks from typical or customary statutory analysis and states that when interpreted in light of the recognition of sexual harassment and hostile work environment claims, "the broad language Congress used" in Title VII must necessarily be read to apply "to any practice in which sex is a motivating factor." *Id.* at 59. Echoing the holdings in *Baldwin*, *supra*, and *Hively v. Ivy Tech Community Coll. of Indiana*, 853 F3d 339 (7th Cir. 2017), the majority buttresses its conclusion on three (3) grounds:

[4] The Second Circuit decision affirmed the judgment of the District Court in all other respects. *See generally,* App. at 3.

> [S]exual 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 . . . Sexual orientation discrimination is also based on assumption of 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.

Id. at 60.

Judge Lynch heads the dissenting opinions. *Id*. at 72-136. Based principally on a recitation of the pre and post-enactment legislative history of Title VII, Judge Lynch's dissent reasons that the original public meaning of "sex" in text of Title VII – which must invariably be the lodestar in statutory analysis – cannot reasonably be read to include sexual orientation as protected by the statute. *Id*. He continues, stating the majority attempts to "shoehorn sexual orientation discrimination into [Title VII's] verbal template of discrimination based on sex" as an oversimplification of the statute:

> Same-sex attraction is not "a function of sex" or "associated with sex" in the sense that life expectancy or childbearing capacity are. A

> refusal to hire gay people cannot serve as a cover 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.

Id. at 104 (emphasis original). The dissenting opinions further summarize the majority's overreaching as a "chip[ping] away at the democratic and rule-of-law principles on which or system of governance is founded – the very principles we rely on to secure the legitimacy and the efficacy of our laws, including antidiscrimination legislation." *Id.* 138 (Livingston, J., dissenting).

REASONS FOR GRANTING THE WRIT

The Court should grant this Petition because it presents a question of heightened significance over which there exists a growing divide amongst the Circuit Courts and provides an ideal vehicle for addressing this question.

At its core, this is a case of statutory construction. Although, to be sure, it is emblematic of the zeitgeist in American conscience and law respecting gender and sex. It demonstrates, *inter alia*, America's ever evolving attitudes toward the civil rights of gay, lesbian, and bisexual individuals.[5] Perhaps it was with an attuned

[5] These terms are used interchangeably by use of the term "sexual orientation."

sensitivity to these developments that the Second Circuit, joining the Seventh and the EEOC, departed from more than fifty (50) years of established precedent in reaching the conclusion that sexual orientation is among the enumerated classes of individuals protected by Title VII as a subset of "sex" discrimination.

Laudable as the ends may be, the means deployed by the Second Circuit nonetheless circumvent the immutable legislative process by which we remain bound to govern. As Judge Sykes set forth in the main dissent in *Hively*, these recent departures are "a judge-empowering, common-law decision method that leaves a great deal of room for judicial discretion. . . . Neither is faithful to the statutory text, read fairly, as a reasonable person would have understood it when it was adopted. The result is a statutory amendment courtesy of unelected judges." *Hively v. Ivy Tech Community Coll. of Indiana*, 853 F3d 339, 360 (7th Cir. 2017) (Sykes, J. dissenting); *see also The Federalist No. 47*, at 251-52 (James Madison) (Carey & McClellan eds., 2001) (quoting Montesquieu "Again: '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.'"). (emphasis original); *I.N.S. v. Chadha*, 462 U.S. 919, 951 (1983) (noting that "hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of tits power, even to accomplish desirable objectives, must be resisted.").

As citizens and a nation, we can strive for the level of inclusion reached by the Second Circuit. However, this cannot be achieved at the expense of compromising our democratic process. The Constitution establishes a procedure for enacting and amending statutes: bicameralism and presentment. *See* U.S. Const. art. I, § 7. Statutory emendation by the judiciary cannot be reconciled with this construct.

Thus, the question before this Court is not whether, as a matter of policy, sexual orientation discrimination *should be* prohibited by statute, regulation, or employer action: Congress and the Executive Branch have acted in this regard by placing prohibitions on such discrimination in a number of differing contexts. *See, e.g.*, 18 U.S.C. § 249(a)(2) (hate crimes); 42 U.S.C. § 13925(b)(13)(A) (certain federal funding programs); Exec. Order 13,672 (July 21, 2014) (government contracting); Exec. Order 13,087 (May 29, 1998) (federal employment); 5 C.F.R. § 300.103(c) (non-performance-related treatment under the Civil Service Reform Act, 5 U.S.C. § 2302(b)(10)). Rather, what must be resolved is whether, as a matter of law, Title VII encompasses sexual orientation discrimination. The answer remains, as it has, no.

I. THE COURTS OF APPEALS AND FEDERAL AGENCIES REMAIN DIVIDED ON THIS QUESTION

The Second Circuit's *en banc* majority holding that sexual orientation is a protected class under Title VII as a proxy for "sex" is the most recent irreconcilable

split on this issue. Prior to the Second Circuit's decision, the Seventh Circuit was the lone appellate court to hold that sexual orientation is protected as a form of sex discrimination under Title VII. *See Hively*, 853 F3d 339. These recent holdings are in conflict with every other Circuit that has addressed this issue.

In fact, the distinction between "sex" and "sexual orientation" within the scope of Title VII is broadly accepted by courts nationwide. *See, e.g.*, *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("Title VII does not proscribe harassment simply because of sexual orientation."); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) ("Simonton has alleged that he was discriminated against not because he was a man, but because of his sexual orientation. Such a claim remains non-cognizable under Title VII."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001) ("Title VII does not prohibit discrimination based on sexual orientation."); *Wrightson v. Pizza Hut of Am.*, 99 F.3d 138, 143 (4th Cir. 1996), *abrogated on other grounds by Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) ("Title VII does not afford a cause of action for discrimination based upon sexual orientation. . . ."); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 762 (6th Cir. 2006) ("[S]exual orientation is not a prohibited basis for discriminatory acts under Title VII."); *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 704 (7th Cir. 2000) ("[H]arassment based solely upon a person's sexual preference or orientation (and not on one's sex) is not an unlawful employment practice under Title VII."); *Williamson v. A.G. Edwards*

& Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) ("Title VII does not prohibit discrimination against homosexuals."); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063-64 (9th Cir. 2002) ("[A]n employee's sexual orientation is irrelevant for purposes of Title VII. It neither provides nor precludes a cause of action for sexual harassment. That the harasser is, or may be, motivated by hostility based on sexual orientation is similarly irrelevant, and neither provides nor precludes a cause of action."); *Medina v. Income Support Div.,* 413 F.3d 1131, 1135 (10th Cir. 2005) ("Title VII's protections, however, do not extend to harassment due to a person's sexuality. . . . Congress has repeatedly rejected legislation that would have extended Title VII to cover sexual orientation.") (internal quotations omitted); *Evans v. Georgia Regional Hosp.*, 850 F3d 1248, 1256–57 (11th Cir 2017), *cert denied*, 138 S. Ct. 557, 199 L. Ed. 2d 446 (2017). Thus, the overwhelming weight of precedent pre-*Hively* is clear: discrimination based on sexual orientation is not prohibited by Title VII.

Moreover, the two (2) federal agencies empowered to enforce Title VII – the EEOC and the U.S. Department of Justice, *see* 42 U.S.C. § 2000e-5(f)(1) – have taken opposite positions on this issue. As set forth *supra*, with *Baldwin v. Foxx*, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015), the EEOC took the position that sexual orientation is protected under Title VII, the rationale for which has been adopted by the Second and Seventh Circuits. Conversely, the Department of Justice has reinforced the position held be the majority of remaining Circuits.

See Brief for the United States as *Amicus Curiae* Supporting Defendants-Appellees at 1, *Zarda v. Altitude Express, Inc.*, No. 15- 3775 (2d Cir. July 26, 2017), 2017 WL 3277292.

That two Courts of Appeals are in conflict with their sister-Circuits on this issue, and the split amongst the EEOC and the Department of Justice, should, standing alone, compel that this Petition be granted.

II. THE SECOND CIRCUIT DECISION DOES NOT FOLLOW FROM A FAIR INTERPRETATION OF TITLE VII

The Second Circuit concludes "the most natural reading of [Title VII's] prohibition on discrimination 'because of . . . sex' is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation." *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 112 (2d Cir. 2018). This is neither a fair or accurate reading of the text of Title VII, nor is it true to established precedent.

This Court mandates that statutes be interpreted not by the ebbs and flows of modern language but by reference to the original public meaning of the enactment. *Sandifer v. U.S. Steel Corp*., 134 S. Ct. 870, 876 (2014) ("It is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (citation and internal quotation marks omitted)). Just last Term, this Court unanimously held 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.*, 137 S. Ct. 1718, 1726 (2017). "[I]t is for Congress, not the courts, to write the law," *Stanard v. Olesen*, 74 S. Ct. 768, 771 (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 (1985) (*citing Victory Carriers, Inc v. Law*, 404 U.S. 202, 216 (1971)). These axioms apply with equal force to Title VII and the circumstances underlying this Petition.

"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 v. Hopkins*, 490 U.S. 228, 239 (1989). 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 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). Absent from this proscriptive language is the ban on workplace discrimination based on an individual's sexual orientation. In fact, since its enactment in 1964, the public meaning in Title VII's

"because of . . . sex" has never encompassed a reading that includes "because of . . . sexual orientation." *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 355 (7th Cir. 2017) (Posner, J., concurring) ("A broader understanding of the word 'sex' in Title VII than the original understanding is thus required in order to be able to classify the discrimination of which Hively complains as a form of sex discrimination.").

To be clear, Title VII does not define discrimination "because of . . . sex." Yet just as in the present, in 1964 the common, ordinary usage of the term "sex" intended biologically male or female; it did not also refer to sexual orientation. *See, e.g.*, *Sex*, The American Heritage Dictionary of the English Language (1st ed. 1969) (defining "sex" as "[t]he property or quality by which organisms are classified according to their reproductive functions[;] [e]ither of two divisions, designated male and female, of this classification"); *Sex*, New Oxford American Dictionary (3d ed. 2010) (defining "sex" as "either of the two main categories (male and female) into which humans and many other living things are divided on the basis of their reproductive functions"); *Sex*, The American Heritage Desk Dictionary (5th ed. 2013) (defining "sex" as "[e]ither of the two divisions, female and male, by which most organisms are classified on the basis of their reproductive organs and functions[;] [t]he condition or character of being female or male"); *Sex*, Dictionary.com, *accessed* May 2, 2018 (defining "sex" as "either the male or female division of a species, especially as differentiated with reference to the reproductive functions[;] the sum of the structural and

functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences[;] the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct."); *see also Sexual Orientation*, Oxford English Dictionary (2009 ed.) (defining "sexual orientation" as "Originally: (the process of) orientation with respect to a sexual goal, potential mate, partner, etc. Later chiefly: a person's sexual identity in relation to the gender to whom he or she is usually attracted; (broadly) the fact of being heterosexual, bisexual, or homosexual."); *Sexual Orientation*, Dictionary.com, *accessed* May 2, 2018 (defining "sexual orientation" as "one's natural preference in sexual partners; predilection for homosexuality, heterosexuality, or bisexuality."); *Hively v. Ivy Tech Community Coll. of Indiana*, 853 F3d 339, n.3 (7th Cir 2017) (Sykes, J., dissenting) ("The term "sexual orientation" does not appear in dictionaries at or around the time of Title VII's enactment. According to the current definition, it is not synonymous with "sex."). Thus, to a fluent speaker of the English language, 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. *Id*. at 363.

Invariably, legislation is adopted in response to social problems, whether they be actual or perceived. Legislators adopt and employ language to remediate these problems or accomplish the most good for the most people. The words used in legislation are used for

a reason; they often have specific, finite meanings. Of course, the march of time may extend the words beyond what the legislators who voted for the statute fully understood or intended. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998) ("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."). Read in light of one of the social problems it was enacted to address, however, Title VII "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." *Zarda v Altitude Express, Inc.*, 883 F3d 100, 144 (2d Cir 2018) (Lynch, J., dissenting) (emphasis in original); *see also Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) ("The critical issue, 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.") (Ginsburg, J., concurring).

As set forth *supra*, apart from the alternate interpretation of Title VII now expounded by the Second and Seventh Circuits, all other Circuits are in lock-step – and have been for decades – in holding sexual orientation is not prohibited under Title VII. This Court has stated that "*stare decisis* is a principle of policy and not a mechanical formula of adherence to the latest decision, [however] it is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the

sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon an arbitrary discretion." *Patterson v McLean Credit Union*, 491 U.S. 164, 172 (1989) (internal citations and quotations omitted); *see also Vasquez v. Hillery,* 474 U.S. 254, 265 (1986) (*stare decisis* ensures that "the law will not merely change erratically" and "permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals").

Moreover, it is a well-established interpretive principle that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998) ("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding."); *Texas Department of Housing & Community Affairs v. Inclusive Communications Project, Inc.*, 135 S. Ct. 2507 (2015). For decades after its initial enactment, courts unanimously held that sexual orientation is not protected by Title VII. By the time that Congress enacted the Civil Rights Act of 1991, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), three (3) Courts of Appeals had ruled that Title VII did not cover sexual orientation. *See Williamson v. A.G. Edwards and Sons, Inc.*, 876 F.2d 69, 70 (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). This precedent

remained firm until *Hively*, *supra*. Against this backdrop, Congress has neither added sexual orientation as a protected trait nor defined discrimination on the basis of sex to include sexual orientation discrimination. In fact, nearly every Congress since 1974 has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation.[6]

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[6] *See*, *e.g.,* Equality Act of 1974, H.R. 14752, 93d Cong. (1974), Civil Rights Amendments of 1975, H.R. 166, 94thCong. (1975), A Bill to Prohibit Discrimination on the Basis of Sex, Marital Status, Affectional or Sexual Preference, H.R. 2667, 94th Cong. (1975), Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975), Civil Rights Amendments of 1975, H.R. 10389, 94th Cong. (1975), Civil Rights Amendments of 1976, H.R. 13019, 94th Cong. (1976), Civil Rights Amendments of 1975, H.R. 451, 95th Cong. (1977), Civil Rights Amendments of 1977, H.R. 2998, 95th Cong. (1977), Civil Rights Amendments of 1977, H.R. 4794, 95th Cong. (1977), Civil Rights Amendments of 1977, H.R. 5239, 95th Cong. (1977), Civil Rights Amendments Act of 1977, H.R. 7775, 95th Cong. (1977), Civil Rights Amendments Act of 1977, H.R. 8268, 95th Cong. (1977), Civil Rights Amendments Act of 1977, H.R. 8269, 95th Cong. (1977), Civil Rights Amendments Act of 1979, H.R. 2074, 95th 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. (1981), Civil Rights Amendments Act of 1981, H.R. 3371, 97th Cong. (1981), A Bill to Prohibit Employment 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. (1983), Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong. (1983), Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985), Civil Rights Amendments Act of 1985, S. 1432, 99th Cong. (1985), Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong. (1987), Civil Rights Amendments Act of 1987, S. 464, 100th Cong. (1987), Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong. (1989), Civil Rights Amendments Act of 1989, S. 47, 101st Cong. (1989), Civil Rights

This is not to say that Congress has never acted to address judicial interpretation of Title VII. When this Court held that Title VII's prohibition on

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Amendments Act of 1987, S. 464, 100th Cong. (1987), Civil Rights Amendments Act of 1991, S. 574, 102nd Cong. (1991), Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong. (1991), Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong. (1993), Civil Rights Act of 1993, H.R. 431, 103d Cong.(1993), Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong.(1994), Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong.(1994), Civil Rights Amendments Act of 1995, H.R. 382, 104th Cong. (1995), Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong.(1995), Employment Non-Discrimination Act of 1995, S. 932, 104th Cong.(1995), Employment Non-Discrimination Act of 1996, S. 2056, 105th Cong.(1996), Employment Non-Discrimination Act of 1997, H.R. 1858, 105thCong.(1997), Employment Non-Discrimination Act of 1997, S. 869, 105th Cong.(1997), Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong. (1998), Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999), Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong.(1999), Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong.(1999), Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001), Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001), Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2001), Civil Rights Amendments Act of 2003, H.R. 214, 108th Cong. (2003), Employment Non-Discrimination Act of 2003, S. 1705, 108thCong. (2003), Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003), Civil Rights Amendments Act of 2005, H.R. 288, 109th Cong. (2005), Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007), Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007), Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009), Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009), Employment Non-Discrimination Act of 2011, H.R. 1397, 112th Cong. (2011), Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011), Employment Non-Discrimination Act of 2013, S. 815 113th Cong. (2013), Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013), Equality Act, H.R. 3185, 114th Cong. (2015), Equality Act, S. 1858, 114th Cong. (2015), Equality Act, H.R. 2282, 115th Cong. (2017), Equality Act, S. 1006, 115th Cong. (2017).

discrimination "because of . . . sex" did not cover an employer's exclusion of pregnancy from coverage under a disability-benefits plan, *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135-40 (1976), Congress abrogated the holding in the Pregnancy Discrimination Act by specifying that Title VII's prohibition on sex discrimination would be deemed to "include" discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Congress did not otherwise delineate the scope of the term "sex". This abrogation of judicial application of Title VII was continued by modifications to the framework for disparate-impact claims in response to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *see* 42 U.S.C. § 2000e-2(k), and for mixed-motive claims in response to *Price Waterhouse v. Hopkins*, 490 U.S. 490 U.S. 228 (1989), *see* 42 U.S.C. § 2000e-2(m), § 2000e-5(g)(2).

In 1991, Congress further amended Title VII. [7] *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). As Judge Lynch eloquently dissented in the appellate opinion, it is the unfortunate reality that "not everything offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically efficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal." (*Zarda v Altitude Express, Inc.*, 883 F.3d

[7] By the time of the 1991 amendment to the Civil Rights Act, the EEOC had also held 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).

100, 148 (2d Cir. 2018) (Lynch, J., dissenting). Thus, when Congress enacted the Civil Rights Act of 1991 it ratified the settled understanding that Title VII does not bar sexual orientation discrimination. This understanding continues to this day.

III. THE METHODOLOGY APPLIED BY THE SECOND CIRCUIT IN EXPANDING THE SCOPE OF TITLE VII IS FLAWED

Following the same rationale employed by the Seventh Circuit (*Hively*, *supra*) and the EEOC (*Baldwin*, *supra*), the Second Circuit found sexual orientation protected under Title VII premised on three (3) justifications: (A) sexual orientation discrimination is sex discrimination because it cannot occur "but for" the individual's sex; (B) sexual orientation falls within Title VII's prohibition on sex discrimination as a form of sex stereotyping; and (C) sexual orientation discrimination is akin to race-based "associational discrimination". None passes thoughtful analysis.

A. The "But For" Test Is Not an Appropriate Methodology for Statutory Interpretation

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). Thus, the critical inquiry in assessing whether an employment practice is in violation of Title VII "because of . . . sex" is whether sex was "a motivating factor in an adverse

employment decision." *Gross v. FBL Fin. Services, Inc.*, 557 U.S. 167, 182 (2009). Referred to by the Second Circuit as the "comparator test" (App. at 66), a "but for" analysis aides in determining whether "*the evidence* shows treatment of a person in a manner which but for that person's [protected characteristic] would be different." *City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (emphasis added) (internal quotations omitted).

The Second Circuit, drawing on the Seventh Circuit's analysis in *Hively*, employed the "but for" test to interpret Title VII and concluded that sexual orientation discrimination is a subset of sex discrimination. *See Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 116 (2d Cir. 2018) (majority) (internal citations omitted) ("[T]he 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). 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.").

However, the purpose of the "but for" analysis is to reveal an employer's motive for taking the challenged action as a factual matter. *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 343 (2013) ("An employee who alleges status-based discrimination

under Title VII need not show that the causal link between injury and wrong is so close that the injury would not have occurred but for the act. So-called but-for causation is not the test. It suffices instead to show that the motive to discriminate was one of the employer's motives, even if the employer also had other, lawful motives that were causative in the employer's decision.").

Applying the "but for" test in this manner puts the proverbial cart before the horse by employing hypotheticals to determine *first* whether sex is a motivating factor in discrimination based on sexual orientation *before* deciding whether sexual orientation is protected under Title VII. Said another way, the evidentiary "but for" test is a useful technique for discerning motive; it has no proper application in statutory interpretation, the paramount issue herein.

Further, the Second Circuit misapplies the "but for" test in its very application. As the majority stated, "[i]n 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." App. at 34. From its very premise, this application of the "but for" test fails by changing *both* the sexual orientation and the sex of their hypothetical subject. *See City of Los Angeles, Dept. of Water and Power v. Manhart*, 435 U.S. 702, 711 (1978) (describing the "simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be difference.'"). The proper

application would be to change the sex, but to otherwise maintain the sexual orientation in applying the "but for" test. As Judge Sykes correctly states in the main dissent in *Hively*:

> As a test for isolating an *actual* case of *sex* discrimination, that way of framing the comparative question doesn't do the trick. Simply put, the comparison can't do its job of *ruling in* sex discrimination as the actual reason for the employer's decision (by *ruling out* other possible motivations) if we're not scrupulous about holding *everything* constant except the plaintiff's sex. That includes the plaintiff's sexual orientation. If we're really serious about trying to isolate whether sex discrimination played a role in a specific employment decision, the test must exclude other factors that may have been decisive.

Hively v. Ivy Tech Community Coll. of Indiana, 853 F.3d 339, 366 (7th Cir. 2017) (Sykes, J., dissenting) (emphasis in original).

Essentially, the "but for" test is being used as an artifice to "interpret" the term "sexual orientation" for use in the context of Title VII. This test has no proper application in discerning the statutory text of Title VII.

B. Sexual Orientation Discrimination Is Not, *Ispso Facto*, Gender Stereotyping under *Price Waterhouse*

Neither *Price Waterhouse* nor any other decision of this Court establishes an independent cause of action for, or "doctrine" or "theory" of, "sex stereotyping." *Price Waterhouse* held only that the presence of gender stereotyping by an employer "can certainly be *evidence*" of sex discrimination; to prove her case, the plaintiff must always prove that "the employer *actually* relied on her gender in making its decision." *Price Waterhouse v. Hopkins*, 490 U.S. 228, at 251 (1989) (second emphasis added).

Moreover, even if an individual who identifies as homosexual can be the victim of gender stereotyping, it does not necessarily follow that in sexual orientation discrimination is interchangeable with the stereotypes otherwise barred by *Price Waterhouse*. As this Court explained, Title VII bars gender stereotypes insofar as that particular sort of "sex-based consideration[]" cause "disparate treatment of men and women." *Id*. at 251. As Judge Sykes explained in the *Hively* dissent:

> Heterosexuality is not a *female* stereotype; it is not a *male* stereotype; it is not a *sex-specific* stereotype at all. An employer who hires only heterosexual employees is neither assuming nor insisting that his female and male employees match a stereotype specific to their sex. He is instead insisting that his employees match the dominant sexual orientation *regardless of their*

> *sex*. Sexual-orientation discrimination does not classify people according to invidious or idiosyncratic *male* or *female* stereotypes. It does not spring from a sex-specific bias at all.

Hively v. Ivy Tech Community Coll. of Indiana, 853 F.3d 339, 365–67 (7th Cir. 2017) (emphasis original).

In any event, the *per curium* panel of the Second Circuit correctly noted that Zarda did not appeal the trial court's determination regarding his claim of discrimination premised on sex stereotypes. *Id*. at 150. In fact, the District Court rejected Zarda's sex stereotyping argument, stating, "[t]here's simply no evidence to believe that that stereotype was motivating Mr. Maynard in this situation. There's no, for example there's no evidence of comments, there's no female comparators who were treated differently. There is literally nothing to support that theory." App. at 162. There is thus no validity in the application to this matter to the theory propounded by the *en banc* majority that sexual orientation discrimination is *ipso facto* sex stereotyping.

An employer who discriminates based on sexual orientation alone does not run afoul of the sex stereotyping proscribed by *Price Waterhouse*. Although sex stereotyping is evidence that may support a claim of sex discrimination, it is not, by itself, always sex discrimination and cannot therefore support the proposition that sexual orientation is a proxy for sex under Title VII.

C. Theories of "Associational Discrimination" Do Not Allow for a Judicial Expansion of Title VII

Sexual orientation discrimination is also not among the type of so-called "associational discrimination" prohibited by Title VII. Translating *Loving v. Virginia*, 388 U.S. 1 (1967) to the context of Title VII, Circuits to address the question of associational discrimination have done so through the statute's prohibition on race discrimination. *See e.g.*, *Holcomb v. Iona Coll.*, 521 F.3d 130, 138 (2d Cir. 2008); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994 (6th Cir. 1999); *Parr v. Woodmen of the World Life Insurance Co.*, 791 F.2d 888, 892 (11th Cir. 1986).

Loving's equal-protection holding extends to Title VII racial-discrimination claims because those claims share the same contextual foundation: The racism inherent in anti-miscegenation laws. By contrast, any employer that discriminates against an employee in a same-sex relationship has not engaged in sex-based treatment of women as inferior to men (or vice versa), but rather based upon sex-neutral treatment directed at a distinct status: sexual orientation. As Judge Lynch explained in the lead dissent to the subject Second Circuit decision:

> 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." 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.

Zarda v. Altitude Express, Inc., 883 F.3d 100, 160 (2d Cir. 2018) (internal citations omitted and emphasis in original).

Thus, in the context of associational discrimination, sexual orientation cannot be substituted for race to achieve the same prohibitions under sex-based discrimination. Holding to the contrary is a judicial amendment to the prohibitions of Title VII.

IV. THIS CASE IS THE APPROPRIATE VEHICLE FOR RESOLVING THE QUESTION PRESENTED

This case is in the perfect posture for the Court to decide whether Title VII's prohibitions on discrimination "because of . . . sex" encompass discrimination based on sexual orientation. In answering this question in the affirmative, the Second Circuit not only reversed the District Court's holding;

it overruled decades of established precedent simply to accommodate new legal theories on a hot-button issue. In the course of doing so, the Appellate Court joined the Seventh Circuit in establishing and fostering a divergent minority view that is irreconcilable with the majority.

This case is also uniquely positioned as compared to others addressing this issue. In fact, other cases to reach this level of judicial review have done in the absence of the employer's involvement. *See Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc); *Evans v. Georgia Regional Hosp.*, 850 F.3d 1248 (11th Cir. 2017), *cert denied,* 138 S. Ct. 557, 199 L Ed 2d 446 (2017).

It is inevitable that this issue will come before the Court time and time again. We respectfully posit that it is time the Court address the growing uncertainty and answer this question to ensure consistent adjudication moving forward.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be granted.

Respectfully submitted,

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