ON THE BASIS OF IDENTITY: REDEFINING "SEX" IN CIVIL RIGHTS LAW AND FAULTY ACCOUNTS OF "DISCRIMINATION"

RYAN T. ANDERSON*

In October 2019, the Supreme Court heard oral arguments in cases that ask whether Title VII of the Civil Rights Act of 1964,[1] which bans employment discrimination on the basis of sex, among other things,[2] extends to discrimination on the basis of sexual orientation and transgender status.[3] It was an odd legal argument, given that the public meaning of the word "sex" in 1964—and today, for that matter—refers to our status as male or female rather than our sexual attractions, desires, actions, or identities.[4]

Because the original public meaning of the word "sex" did not refer to sexual orientation or gender identity, progressive activists have been trying for the past forty years to get Congress to pass laws that would add "sexual orientation" as a protected class, and have been doing the same for "gender identity" for the past dozen years.[5] Because their attempts to work through

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* William E. Simon Senior Research Fellow in American Principles & Public Policy, The Heritage Foundation; St. John Paul II Teaching Fellow in Social Thought, University of Dallas. This Article is adapted from Brief of Ryan T. Anderson as Amicus Curiae in Support of Employers, Bostock v. Clayton County, No. 17-1618, and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Aug. 21, 2019).

1. 42 U.S.C. § 2000e (2018).

2. *Id.* § 2000e-2(a).

3. *Bostock*, No. 17-1618 (U.S. argued Oct. 8, 2019); *Harris Homes*, No. 18-107 (U.S. argued Oct. 8, 2019).

4. *See* Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL'Y 309, 309–10 (2018).

5. The first such bill was introduced in the House of Representatives on January 15, 1975. H.R. 166, 94th Cong.; 121 CONG. REC. 188 (1975). It added "affectional or sexual preference" after "sex." *Id.* Other bills have since added "sexual orientation" and "gender identity." *See* Anderson, *supra* note 4, at 342–43. Congress knows how to reject "sexual orientation and gender identity" provisions and has done so on many occasions. *See* Equality Act, H.R. 2282, 115th Cong. (2017); Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

the legislative process failed, activists took their arguments to court. And they failed there, too—at least until April 2017. That marked the first time ever that a federal appellate court ruled that the Civil Rights Act prohibits employment discrimination on the basis of sexual orientation.[6] Before that ruling, "all eleven courts of appeals that had addressed the issue" had ruled that "sex" does not mean "sexual orientation."[7] And it was not until March 2018 that, for the first time ever, an appellate court ruled that Title VII banned discrimination based on transgender status.[8]

Of the three cases before the Supreme Court, two involve claims about sexual orientation and the third deals with gender identity. In the two sexual orientation cases,[9] two employees who identify as gay (Donald Zarda and Gerald Bostock) argue they were fired from their jobs because they disclosed their sexual orientation.[10] Their employers deny this, arguing that the employees were fired for job-related misconduct.[11] Regardless of the question of fact, the question of law is whether dismissing someone because of their sexual orientation constitutes sex discrimination.[12] In the gender identity case,[13] the facts are somewhat clearer: A male employee who desired to transition and present at work as a woman (Aimee Stephens) was dismissed

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6. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 341 (7th Cir. 2017).

7. Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 4, *Bostock*, No. 17-1618 (U.S. Aug. 23, 2019); *see also* Evans v. Ga. Reg'l Hosp., 850 F.3d 1248, 1255 (11th Cir. 2017); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Hamm v. Weyauwega Milk Prods., Inc., 332 F.3d 1058, 1062 (7th Cir. 2003); Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1063 (9th Cir. 2002); 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); 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); Ruth v. Children's Med. Ctr., No. 90-4069, 1991 WL 151158, at *5 (6th Cir. 1991) (per curiam); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam).

8. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 571 (6th Cir. 2018).

9. *Bostock*, No. 17-1618 (U.S. argued October 8, 2019), *consolidated with* Altitude Express, Inc. v. Zarda, No. 17-1623 (U.S. argued October 8, 2019).

10. Zarda v. Altitude Express, Inc., 883 F.3d 100, 108–09 (2d Cir. 2018) (en banc); Bostock v. Clayton County, No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192898, at *4 (N.D. Ga. Nov. 3, 2016).

11. *Zarda*, 883 F.3d at 108–09; *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *4.

12. *Zarda*, 883 F.3d at 110; *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *5.

13. R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. argued Oct. 8, 2019).

from employment as a funeral home director.[14] Stephens argues the dismissal was because of transgender status, which is a form of sex discrimination.[15] The employer, Harris Funeral Homes, argues it was because Stephens would no longer follow the appropriate sex-specific dress code or use the appropriate single-sex bathroom—and thus there was no sex discrimination.[16]

The lawyers for the employees in *Zarda* and *Harris* asked the Supreme Court to affirm the novel—indeed, activist—appellate court rulings.[17] Doing so would in effect redefine the term "sex" in the Civil Rights Act and simultaneously require a simplistic account of "discrimination." To see how and why it would entail this, it is worth examining the various arguments they put forth.

The lawyers for the employees and their amici contend that any policy that *adverts* to sex must *discriminate* because of sex.[18] Only in this way are they able to give Title VII a scope that for decades no one would have ascribed to it. And in the process, they are forced to rely on confused theories of discrimination and of sex. Over and over, the employees and their amici offer crucially flawed analogies, comparators, and analyses that effectively read the words "discrimination," "disadvantageous," and "comparable terms" out of the law altogether. This distorted reading leads to implausible and costly results that cut against the balance Congress struck in crafting Title VII. This Article aims to clarify the philosophical issues behind that costly distortion.

As the Supreme Court unanimously held in *Oncale v. Sundowner Offshore Services, Inc.*,[19] Title VII requires "neither asexuality nor androgyny."[20] What it requires is equality and

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14. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).

15. *Id.*

16. *Id.* at 569; *6 Questions with the Attorney Arguing the Harris Funeral Homes Case at the Supreme Court*, ALLIANCE DEFENDING FREEDOM (Aug. 20, 2019), https://adflegal.org/detailspages/blog-details/allianceedge/2019/08/20/6-questions-with-the-attorney-arguing-the-harris-funeral-homes-case-at-the-supreme-court [https://perma.cc/5L9R-KFTV].

17. Opening Brief for Respondents at 14, Altitude Express, Inc. v. Zarda, No. 17-1623 (U.S. June 26, 2019) [hereinafter Zarda Brief]; Brief for Respondent Aimee Stephens at 19, *Harris Homes*, No. 18-107 (U.S. June 26, 2019) [hereinafter Stephens Brief].

18. Zarda Brief, *supra* note 17, at 10–14; Stephens Brief, *supra* note 17, at 3.

19. 523 U.S. 75 (1998).

20. *Id.* at 81.

neutrality. It forbids double standards for men and women—policies that disfavor at least some individuals of one sex compared with similarly situated members of the other. The Court in *Oncale* quoted Justice Ginsburg to explain: "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."[21] This reading by Justice Ginsburg, embraced by the unanimous Court, remains valid. Yet the employees and their amici explicitly reject it, as their position requires. The Supreme Court should hold fast to Justice Ginsburg's reading wherein Title VII violations consist of double standards for women and men.

In *Price Waterhouse v. Hopkins*,[22] the plurality opinion of the Supreme Court observed that under Title VII, sex "must be irrelevant to employment decisions."[23] This requires, as the plurality opinion in *Price Waterhouse* also said, that sex not be used to create "disparate treatment of men and women."[24] Expanding on this point, Justice O'Connor's concurrence pointed out that an employee's sex may "always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."[25] Title VII does not require blindness to sex; it requires "neither asexuality nor androgyny."[26]

Title VII forbids unfairness because of sex. It excludes not just any sex-conscious standards, but double standards. Yet the lawyers for the employees and their amici urge the Court to adopt a theory of sex discrimination that would rule out (as discriminatory) any policies that advert to sex, rather than only those sex-related policies that result in "disparate treatment of men and women,"[27] where members of one sex suffer under

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21. *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

22. 490 U.S. 228 (1989).

23. *Id.* at 240 (plurality opinion).

24. *Id.* at 251 (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

25. *Id.* at 277 (O'Connor, J., concurring in the judgment).

26. *Oncale*, 523 U.S. at 81.

27. *Id.* at 78 (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)) (internal quotation marks omitted).

"disadvantageous terms" that the other does not.[28] Embracing the employees' theory would lead to asexuality and androgyny.

Indeed, adopting the employees' theory would not simply distort the statutory text and flout the Supreme Court's unanimous precedent in *Oncale*. It would also work serious practical harms—and unsurprisingly so. After all, the Court would be rewriting the law Congress passed but with no opportunity for legislators to add to the definitions, qualifications, and limits they might have included if they had actually decided to address sexual orientation and gender identity. For instance, the employees' position—where any policy that adverts to sex discriminates because of sex—would require either the elimination of all sex-specific programs and facilities or allow access based on an individual's subjective identity rather than their objective biology. That the advocates for this theory are evasive about which of these outcomes is required by their theory is telling. Making its implications explicit would prove decisively that their reading is unsound.

It would also highlight the severe consequences for privacy, safety, and equality. Employers would be prevented from protecting their employees' privacy and would be exposed to significant liability. For example, they would have to cover objectionable medical treatments in their employer-sponsored healthcare plans. And the consequences would not be limited to the employment context: if this new theory of sex and of discrimination is imposed on Title VII, then why not Title IX? Such a reading of sex discrimination would spell the end of girls' and women's athletics, along with private facilities at school.[29]

In short, the lawyers for the employees ask the Supreme Court to rewrite our nation's civil rights laws in a way that would directly undermine one of their main purposes: protecting the equal rights of girls and women. Congress did not legislate such an outcome, and the Court should not usurp Congress's authority by imposing such an extreme policy on the nation. Biology is not bigotry, and the Court should not conclude otherwise. Only Congress, not the Court, can craft policy to address

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28. *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

29. *See* Anderson, *supra* note 4, at 310.

sexual orientation and gender identity—concepts distinct from sex—with attention to all the competing considerations.[30]

I. SEX, SEXUAL ORIENTATION, AND GENDER IDENTITY ARE ANALYTICALLY DISTINCT CONCEPTS

The lawyers for the employees and their amici seek to bypass Justice Ginsburg's reading of Title VII—embraced unanimously by the Supreme Court in *Oncale*—by arguing that sex, sexual orientation, and gender identity are analytically inseparable. For instance, Stephens argues "it is impossible to discriminate against a person for being transgender *without* their sex assigned at birth being a cause of the decision."[31] And amici philosophy professors argue: "If an employer decides to terminate an employee on the basis of same-sex sexual attraction (i.e., a particular sexual orientation) or gender nonconformity (e.g., being transgender), the employer must first presume the employee's specific sex . . . ."[32] None of this is true.

Harris Homes did not "first presume the employee's specific sex." Rather, every document that Stephens presented during the first six years of employment stated that Stephens was a male.[33] During the entirety of those six years, Stephens abided by the male dress code.[34] It was only when Stephens declared to be a woman and desired to start dressing according to the female dress code that Harris Homes learned that Stephens identified as transgender.[35] Even so, the philosophy professors write:

> It is simply not possible to identify an individual as being attracted to the same sex without knowing or presuming that

30. On how best to craft such policy, see Ryan T. Anderson, *Challenges to True Fairness for All: How SOGI Laws Are Unlike Civil Liberties and Other Nondiscrimination Laws and How to Craft Better Policy and Get Nondiscrimination Laws Right*, *in* RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).

31. Stephens Brief, *supra* note 17, at 25.

32. Brief of Philosophy Professors as *Amici Curiae* in Support of the Employees at 2, Bostock v. Clayton County, No. 17-1618, and R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. July 3, 2019) [hereinafter Philosophy Professors Brief].

33. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018).

34. *Id.*

35. *See id.* at 567–69.

> person's sex. Likewise, it is not possible to identify someone as gender nonconforming (including being transgender) without reference to that person's known or presumed sex and the associated social meanings.[36]

But is it really true that individuals cannot be identified as gay or trans "without knowing or presuming that person's sex"? Consider: Kim just came out as trans. Or, Kim just came out as gay. So far, all we know is that Kim is trans or gay. We have no idea if Kim is a man or a woman. We do not know the sex of Kim at all. But because we know the sexual orientation and gender identity, we could act based on that without being motivated by—let alone even knowing—Kim's sex.

Nevertheless, Professors William Eskridge and Andrew Koppelman declare that "You can't say gay without classifying Kim by his sex."[37] Of course you can. "Kim is gay." What we now know is that Kim is attracted to people of the same sex. We do not know if that sex is male or female, and so knowing that Kim is gay does not classify Kim by sex.

To best illustrate the problems with this aspect of the legal theory advanced by the lawyers for the employees and their amici, consider three distinct types of motivation in employment decisions. First, consider an employer who will not employ women but will employ men, or who will not employ women with kids but will employ men with kids. This would be discrimination on the basis of sex, because "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[38] It is a double standard for men and women.

By contrast, consider an employer who will hire straight men and women, but not men and women who identify as gay. Men and women are exposed to the same exact terms and conditions, so this would not be discrimination based on sex. The employment action does not hinge on male or female, but on gay or straight.

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36. Philosophy Professors Brief, *supra* note 32, at 1.

37. Brief of William N. Eskridge Jr. & Andrew M. Koppelman as *Amici Curiae* in Support of Employees at 6, *Bostock*, No. 17-1618, and *Harris Homes*, No. 18-107 (U.S. July 3, 2019) [hereinafter Eskridge & Koppelman Brief].

38. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

And lastly, consider an employer who will hire cisgender[39] men and women, but not transgender men and women. Here, too, men and women are exposed to the same exact terms and conditions, so this would not be discrimination based on sex. The employment action here is not concerned with male or female, but with cisgender or transgender.

Now, whatever one may think about these three cases as a matter of ethics or public policy, Congress acted in 1964 to address only the first case—and it has explicitly rejected policies to address the latter two. The first such bill was introduced in the House of Representatives on January 15, 1975.[40] It would have prohibited discrimination based on "affectional or sexual preference."[41] Other bills have since added "sexual orientation" and "gender identity."[42]

People can debate whether Congress's decision not to pass sexual orientation and gender identity laws is or is not a good thing, but as a legal matter the issue is clear. Discrimination on the basis of sex is prohibited, but discrimination on the basis of sexual orientation and gender identity is not. Of course, there is good reason why Congress has rejected calls to legally prohibit "discrimination" on the basis of "sexual orientation and gender identity."[43] Much of what the activists contend is "discrimination" is simply disagreement about human sexuality, where acting based on true beliefs about human sexuality is redescribed as discriminatory.[44]

Congress knows how to make policy on the basis of "gender identity" when it wants to do so. Congress has specifically included "gender identity"—as distinct from "sex" and listed

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39. The word "cisgender" is an ideological term that I would not ordinarily use, but I use it here and throughout this Article to highlight that *even on the LGBT activists' own theory*, their argument fails.

40. H.R. 166, 94th Cong. (1975); 121 CONG. REC. 188 (1975).

41. H.R. 166.

42. *See* Anderson, *supra* note 4, at 341–43 (citing the Employment Non-Discrimination Act, *e.g.*, S. 815, 113th Cong. (2013), introduced in almost every Congress since 1994; the so-called Equality Act, H.R. 2282, 115th Cong. (2007); and the Student Non-Discrimination Act, S. 439, 114th Cong. (2015); H.R. 846, 114th Cong. (2015), as examples of bills attempting to add protection for sexual orientation and gender identity that did not pass).

43. *See* Ryan T. Anderson, *Shields, Not Swords*, NAT'L AFF., Spring 2018, at 74, 75.

44. See Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL'Y 123, 141–43 (2018).

alongside "sex" or "gender"—in two laws: the Violence Against Women Reauthorization Act of 2013[45] and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009.[46] The distinct inclusion of both gender identity and sex protections highlights that gender identity was never intended to fall within the definition of sex. If Congress had intended to include gender identity protections within the scope of Title VII, it could have specified their inclusion, but it did no such thing.

The executive branch likewise knows how to add categories. President Barack Obama showed that he understood "sex," "sexual orientation," and "gender identity" to be different categories. In his executive order barring federal contractors from "discrimination" on the basis of "sexual orientation and gender identity," he replaced existing protections on the basis of "sex" with protections on the basis of "sex, sexual orientation, gender identity."[47] In adding "sexual orientation" and "gender identity" alongside and in addition to "sex," President Obama showed that he did not consider sexual orientation and gender identity protections to be legally included in the existing protections on the basis of sex.

So, too, multiple cities and states have amended their civil rights codes over the years to add "sexual orientation" and "gender identity" to their existing bans on sex discrimination.[48] The cities and states understand that these are three separate concepts. Some cities and states have decided to protect all three;[49] some two;[50] and many have opted for protections on the

45. Pub. L. No. 113-4, sec. 3(b)(4), § 40002(b)(13)(A), 127 Stat. 54, 61 (to be codified in scattered sections of the U.S. Code).

46. Pub. L. No. 111-84, §§ 4703(a), 4704(a)(1)(c), 4707(a), 4708(a), 4710(2), 123 Stat. 2190, 2836–37, 2839, 2841 (codified in scattered sections of 18, 28, and 42 U.S.C.).

47. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

48. *See, e.g.*, 2003 Cal. Legis. Serv. ch. 164 (West) (adding protection for discrimination on the basis of "gender identity" to existing housing and employment laws); 1999 Cal. Legis. Serv. ch. 592 (West) (adding protection for discrimination on the basis of "sexual orientation" to existing housing and employment laws); The City of Birmingham Non-Discrimination Ordinance, Birmingham, Ala., Ordinance 17-121(c)(3) (Sept. 29, 2017).

49. *See, e.g.*, NEV. REV. STAT. § 613.330 (2019); MIAMI, FLA., CODE OF ORDINANCES § 11A-2(8) (2020).

50. *See, e.g.*, WIS. STAT. § 111.36(1)(d) (West 2018); FORT WAYNE, IND., CODE OF ORDINANCES § 93.001 (2019).

basis of sex but not on the bases of sexual orientation and gender identity.[51]

The language LGBT advocates use reflects these distinctions. Consider these three forms of discrimination: sexism, cissexism, and heterosexism.[52] In their focal cases, these forms of discrimination have the following targets: women, people who identify as transgender, and people who identify as gay, respectively. When these three forms of discrimination occur against their focal targets they can be described as acts of misogyny, transphobia, and homophobia.[53] The three sets of terms naming three different social phenomena reveal something important about the chain of decisionmaking. Sexism, with its typical target of women, manifesting in the focal case as misogyny, entails treating at least some individuals of one sex (women) worse than individuals of the other sex (men). Cissexism, with its typical target of people who identify as transgender, manifesting in the focal case as transphobia, entails treating at least some individuals of a certain gender identity (transgender) worse than individuals of another (cisgender). Heterosexism, with its typical target of people who identify as gay, manifesting in the focal case as homophobia, entails treating at least some individuals of a certain sexual orientation (gay) worse than individuals of another (straight). No one outside this legal dispute would seriously refer to transphobia and homophobia as sexism.[54]

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51. *See, e.g.*, TEX. LAB. CODE ANN. § 21.051 (West 2015); *see also Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender [https://perma.cc/YQC8-NWTQ]; *Sex and Gender Discrimination in the Workplace*, NAT'L CONF. ST. LEGISLATURES (Mar. 28, 2019), http://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx [https://perma.cc/M6FX-MK4W] (last visited Mar. 2, 2020); *State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN, https://www.hrc.org/state-maps/employment [https://perma.cc/KR4E-CQLT] (last visited Jan. 3, 2020).

52. The words "cissexism" and "heterosexism" are ideological terms that I would not ordinarily use, but I use them here and throughout this Article to highlight that *even on the LGBT activists' own theory*, their argument fails.

53. The words "transphobia" and "homophobia" are ideological terms that I would not ordinarily use, but I use them here and throughout this Article to highlight that *even on the LGBT activists' own theory*, their argument fails.

54. To illustrate how LGBT activists use their own ideological terms, see, for example, Lauren Munro, Robb Travers & Michael R. Woodford, *Overlooked and Invisible: Everyday Experiences of Microaggressions for LGBTQ Adolescents*, 66 J. HOMOSEXUALITY 1439 (2019). The first line of the abstract from this 2019 article

Not only are the concepts "sexual orientation" and "gender identity" analytically separate from sex, the underlying realities are also different. Sex is a stable, binary, biological phenomenon, determined by how an organism is organized with respect to sexual reproduction.[55] By contrast, sexual orientation and gender identity refer to a person's attractions, desires, actions, and identities; they are fluid, exist along spectra, and are subjective.[56] This contrast highlights another flaw with the theory advanced by the lawyers and amici of the employees: They assert that gender identity can only be known in reference to sex.[57] But that assumes the very gender binary that contemporary gender theorists reject.[58] A gender-fluid or gender-ambidextrous identity makes no reference to biological sex at all. The entire point is to define one's gender identity independently from the body. That said, if all of these identities are protected under "sex" discrimination, what does an employer do for employees who identify as nonbinary? Which locker room or dress code should they use? What about employees who are gender fluid, identifying as men at some times and women at others? Treating employees in accord with their biological sex could violate a gender identity nondiscrimination norm while acting on the basis of gender identity could violate a sex nondiscrimination norm. Consequently, employers are forced into a Catch-22.

II. NO ONE IS EXCLUDED FROM TITLE VII'S SEX PROTECTIONS, BUT TITLE VII DOES NOT PROTECT SEXUAL ORIENTATION OR GENDER IDENTITY

Another argument advanced to the Court was that failure to redefine the word "sex" to mean "sexual orientation" and

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reads: "Lesbian, gay, bisexual, transgender, and queer (LGBTQ) adolescents face a number of challenges in their lives related to heterosexism and cissexism." *Id.* at 1439. Throughout the article, the word "heterosexism" appears seventeen times. *Id.* at 1439–40, 1443, 1445–46, 1459, 1470–71. "Cissexism" appears four times. *Id.* at 1439–40, 1456. "Transphobia" appears eleven times. *Id.* at 1445–46, 1451, 1456, 1459, 1467–68. "Homophobia" appears nine times. *Id.* at 1443, 1446, 1451, 1456, 1458, 1467–69. The word "sexism" never appears. *Id.* at 1439–71.

55. *See* RYAN T. ANDERSON, WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT 79–81 (1st paperback ed. 2019).

56. *See id.* at 31–33.

57. *See* Philosophy Professors Brief, *supra* note 32, at 1.

58. *See* ANDERSON, *supra* note 55, at 29–33.

"gender identity" will result in excluding from Title VII's protections people who identify as gay and transgender. For instance, Stephens contends that "Harris Homes and the United States effectively ask this Court to write an exclusion into Title VII to deny transgender people the protection from sex discrimination that the statute provides to *all* employees."[59]

Nothing like this is true. Title VII protects all employees from *sex* discrimination, not purported discrimination on some other basis. Employees who identify as transgender have the same Title VII protection as employees identified as cisgender: protection from sex discrimination. But neither cisgender nor transgender employees have Title VII protection from gender identity discrimination.

To see this, consider an employer who refuses to hire Caitlyn Jenner because the employer refuses to hire women (believing only men can do the work) and believes Jenner is a woman. In this case, Jenner would have a perfectly valid Title VII case. Likewise, if an employer refuses to hire Jenner because the employer believes Jenner is a man and refuses to hire men (thinking only women can do the work), Jenner would have a perfectly valid Title VII case. But if the employer thinks both men and women can do the task, but people who transition cannot (whether male or female), and refuses to hire Jenner on those grounds, then there is no Title VII case. The employment decision was not discrimination because of sex.

Zarda raises a similar point, "Federal courts have consistently and properly recognized that Title VII does not exempt any class of employees from its protection, and therefore gay employees have the same ability as heterosexual employees to bring sex stereotyping claims that involve their nonconformity to masculine or feminine sex stereotypes."[60] To be sure, gay employees have the right to bring sex discrimination claims, including in cases where sex stereotypes are evidence of that discrimination. But homosexuality and heterosexuality themselves rest on no masculine or feminine sex stereotypes. Both concepts are defined by same-sex or opposite-sex relations, not by masculine or feminine sex stereotypes. And, as explained

59. Stephens Brief, *supra* note 17, at 17.
60. Zarda Brief, *supra* note 17, at 28–29.

below, support for male-female marriage rests on no masculine or feminine sex stereotypes.

In all events, no one is being excluded from the protections of Title VII. Everyone, regardless of sexual orientation and gender identity, is protected from being discriminated against because of their sex. Whether they identify as gay or straight, cisgender or transgender, all people have the legal right not to be discriminated against because of their sex. But no one has the legal right to redefine the word sex in federal law to mean something other than sex. Thus, no one has Title VII protections based on sexual orientation or gender identity.

III. THE EMPLOYEES IGNORE THAT DOUBLE STANDARDS BASED ON SEX WERE AT THE HEART OF *PHILLIPS V. MARTIN MARIETTA*

The lawyers for the employees and their amici also misapply the Supreme Court's ruling in *Phillips v. Martin Marietta Corp.*[61] by ignoring the double standard that drove the judgment in that case.[62] For starters, Stephens contends: "Much as Ms. Phillips was discriminated against for being a woman *and* for having young children, so Ms. Stephens was fired for having a male sex assigned at birth *and* for living openly as a woman. That is sex discrimination . . . ."[63]

But this assertion ignores the actual structure of the discrimination in *Phillips*. Ms. Phillips was discriminated against on the basis of sex because men with young children were not held to the same terms and conditions as women with young children.[64] Had both men and women been held to the same standard, there would have been no disparate impact on men and women and no double standard on terms and conditions based on sex. Because there is no male-female double standard in the *Harris Homes* case, *Phillips* is not on point. Stephens was fired for not complying with the company's sex-specific dress code, which was compliant with the Equal Employment

61. 400 U.S. 542 (1971).
62. *Id.* at 544.
63. Stephens Brief, *supra* note 17, at 25 (citation omitted).
64. *See Phillips*, 400 U.S. at 544.

Opportunity Commission (EEOC).[65] Both males and females have to equally follow this dress code; it does not impose more of a burden on one or the other. The EEOC-compliant dress code does not create "disparate treatment of men and women"[66] nor does it create conditions in which "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[67] The "sex plus" theory simply does not apply in Stephens's case. Nor does it apply in Zarda's case. Zarda argues:

> Had Martin Marietta articulated its policy as a refusal to hire "mothers," rather than not hiring "women with young children," the result would have been the same. Phillips's sex (plus her parental status) is why she did not get the job . . . . The same logic applies to Zarda. Were he not a man, he would not have been fired for his attraction to men. Conversely, persons who shared his attraction to men but not his sex (i.e., "heterosexual women") were not denied job opportunities. Saying he was fired for being "gay" does not change the analysis. Thus, Zarda has properly alleged discrimination "because of [his] sex."[68]

But the reason Martin Marietta was guilty of discrimination based on sex was not that it used certain magical words ("women with young children," rather than "mothers") but rather that it did not apply the same terms and conditions to "men with young children" and "fathers" as it did to "women with young children" and "mothers."[69] If it had an evenhanded policy against "people with young children" and "parents," then there would have been no sex discrimination. So, too, an evenhanded policy against same-sex relationships does not discriminate on the basis of sex.

The lawyers for Zarda obscure this dispositive point by picking an inapposite comparator. Comparing Zarda with "persons

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65. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018).

66. Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion) (quoting L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

67. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

68. Zarda Brief, *supra* note 17, at 21 (alteration in original).

69. *See Phillips*, 400 U.S. at 544.

who shared his attraction to men but not his sex (i.e., 'heterosexual women')"[70] changes two factors—sex and sexual orientation—and so fails to ferret out the basis for the employment decision. Comparing a homosexual man to a heterosexual woman will not tell us if the employment decision was driven by sex or by sexual orientation. The question is whether men and women attracted to their own sex are treated differently from each other.

This reasoning is why Zarda's appeal to *Oncale* fails: "Only *men* who are attracted to men are fired for that attraction; women attracted to men can keep their jobs. In other words, men have been 'exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'"[71] But in such a situation, men would be exposed to exactly the same terms and conditions as women: no same-sex attraction. There is no double standard—no greater burden on women than men or vice versa.

Zarda's lawyers answer that:

> The fact that the employer has another, parallel policy that it applies to women—namely, that it fires them if they are attracted to women—cannot insulate the employer from liability. That simply means that women as well are exposed to a disadvantageous term or condition of employment to which members of the other sex are not exposed . . . .[72]

But this flatfooted, rule-counting test sidesteps the crucial question—whether men and women face unequal burdens under the policies at issue. The answer is clear: they do not. Under such policies, both men and women are prohibited from same-sex relationships.

Stephens's comparison, too, changes two factors—sex and transgender status. Stephens argues that Harris Homes "would not have fired Ms. Stephens for identifying and living openly as a woman if she were assigned a female sex at birth."[73] Well, yes, Harris Homes would not fire a woman who followed the women's dress code. But that is not an apt comparison to Stephens—a man who sought to follow the women's dress

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70. Zarda Brief, *supra* note 17, at 21.
71. *Id.* at 37 (quoting *Oncale*, 523 U.S. at 80).
72. *Id.*
73. Stephens Brief, *supra* note 17, at 20.

code. Comparing Stephens to a cisgender woman changes two factors—sex and transgender status—and thus fails to hold constant all factors but sex. The proper comparison would be a woman who sought to dress according to the men's dress code. That way both employees identify as transgender, and all that is changed is their sex. Comparing a transgender male to a cisgender female will not tell us whether the employment decision was driven by sex or by transgender status. The relevant comparison is whether men who identify as the opposite sex are treated differently from women who identify as the opposite sex. That is, whether trans men and trans women are treated the same. Harris Homes reports they would dismiss a female employee who sought to abide by the male dress code.[74] In other words, there is no double standard for men and women, so there is no discrimination on the basis of sex. Both males and females who refuse to follow the dress code for their sex are held to the same standard.

IV. TITLE VII DOES NOT SIMPLY FORBID ANY ACTION "CAUSALLY LINKED" TO SEX

The baseline theory of sex discrimination that activists advanced at the Court was that any action that even adverts to sex is discrimination on the basis of sex. Stephens contends, "Any time the same decision would not have been made had the employee's sex been different, an employer discriminates 'because of sex.'"[75] Professors Eskridge and Koppelman argue that "an employer violates the law if it (1) takes negative employment action (2) that is causally linked to (3) the sex of the employee."[76]

These theories focus simply on "negative" treatment—not disadvantages to which individual women but not men are exposed and vice versa. So neither of these theories identifies discrimination. Both flout the Justice Ginsburg reading—on which Title VII forbids double standards. In contravention of *Oncale*, both require asexuality and androgyny.

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74. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 567 (6th Cir. 2018).

75. Stephens Brief, *supra* note 17, at 21 (citing L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 711 (1978)).

76. Eskridge & Koppelman Brief, *supra* note 37, at 5.

To see the problem with such an approach, just look at what embracing such theories would require: Suppose a male employee at a fitness center repeatedly goes into the woman's locker room and is fired. Had his "sex been different" he would not have been fired; the decision to fire him was "causally linked" to his sex. But the negative treatment the employee faced was not sex discrimination, because the employer imposed no double standard for men and women. It enforced a bathroom policy that imposed the same burden on men and women.

Or suppose a female lifeguard is fired because she wears swimsuit bottoms but refuses to wear tops. Had her "sex been different," she would not have been fired; the decision to fire her was "causally linked" to her sex. Yet her termination was not sex discrimination under Title VII because a male lifeguard who exposed his private parts would have similarly been fired. The attire policy thus was no more burdensome for women than for men.

The employees' proposed test is too simplistic. It does not test for sex-based discrimination. In both of the above examples, the employees were fired because they acted in ways that violated benign company privacy policies—that is, policies that do not impose "disadvantageous terms or conditions of employment" on anyone, much less impose disadvantages on some "to which members of the other sex are not exposed."[77] To be a meritorious case of sex discrimination, sex must not only be a "but-for" cause of differential treatment, but that differential treatment must entail disadvantageous terms or conditions to which members of only one sex are subjected. The simplistic test the employees offer just looks for the but-for cause and "negative" treatment, not discrimination and disadvantages imposed on members of only one sex.

Far from being an instance of sex discrimination, preventing males from entering women-only private facilities is actually required to avoid sex discrimination. And thus, using sex as a but-for cause for differential treatment in some cases is not only permitted but required. Justice Ginsburg took this point for

77. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

granted in her majority opinion in *United States v. Virginia*,[78] when she explained that, for the all-male Virginia Military Institute to become coed, it "would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements."[79] Moreover, in 1975, when critics argued that the Equal Rights Amendment would require unisex intimate facilities, then-Professor Ruth Bader Ginsburg explained that a ban on sex discrimination would not require such an outcome: "Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy."[80] An employer who allowed males to enter private women-only facilities could expect a Title VII lawsuit asserting it fostered a hostile work environment for women by allowing their privacy to be violated.

Yet the theory advanced by the lawyers for the employees and their amici would hold such an employer guilty if he prevented males from entering. Their theory requires asexuality and androgyny, but Title VII does not—it forbids double standards and protects sensible workplace privacy policies. In practice, of course, the employees and their amici would have no objection if an employer fired a male employee who identified as a man from entering a women's locker room. Consider the example above: A male employee at a fitness center who repeatedly goes into the women's locker rooms should be fired if he identities as a man, but not if he identifies as a woman. A female lifeguard who goes topless should be fired if she identifies as a woman, but not if she identifies as a man. So their proposed outcome forces employees to treat men and women differently *based on their gender identity*. A business would have to grant and deny access to its showers and lockers according to this table:[81]

78. 518 U.S. 515 (1996).

79. *Id.* at 550 n.19.

80. Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21, https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg [https://perma.cc/K667-9TTQ].

81. RYAN T. ANDERSON & MELODY WOOD, GENDER IDENTITY POLICIES IN SCHOOLS: WHAT CONGRESS, THE COURTS, AND THE TRUMP ADMINISTRATION SHOULD DO 14 (Heritage Found., Backgrounder No. 3201, 2017), https://www.heritage.org/sites/default/files/2017-03/BG3201.pdf [https://perma.cc/3SRS-BJYL].

Access to Lockers and Showers Under Obama Administration Guidance

ACCESS TO GIRLS' LOCKERS AND SHOWERS

Sex	Gender Identity	Access
Female	Female	Allowed
Female	Male	Allowed
Male	Female	Allowed
Male	Male	Denied

ACCESS TO BOYS' LOCKERS AND SHOWERS

Sex	Gender Identity	Access
Male	Male	Allowed
Male	Female	Allowed
Female	Male	Allowed
Female	Female	Denied

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The table illustrates that the only employees who must be denied access are those who identify with their biological sex—that is, cisgender employees—which is a clear example of irrational gender identity discrimination under the employees' own logic.

V. NO SEX STEREOTYPING IS TAKING PLACE IN THESE CASES

Another argument advanced at the Court by the lawyers for the employees is that purported discrimination based on sexual orientation and gender identity involved sex stereotyping.[82] The employees and amici tried to evade Justice Ginsburg's reading of Title VII by expanding *Price Waterhouse* beyond its holding or logic. In their view, any policies that advert to sex or sexual conduct are "sex stereotypes" and thus constitute "discrimination" because of sex.[83] As Justice Ginsburg explained in *United States v. Virginia*, sex stereotyping takes place when there are "overbroad generalizations about the different talents, capacities, or preferences of males and females."[84] And although the *Price Waterhouse* plurality said sex stereotyping may be used as evidence of sex discrimination, it did not refer to just any belief or norm (for example, dress codes) that somehow touches on sex.[85] Rather, it refers to beliefs, norms, or expectations that disadvantage women (at least some women relative to some men) or disadvantage men (at least some men relative to some women).[86]

After all, the *Price Waterhouse* Court was interpreting Title VII, which is about discrimination.[87] The *Price Waterhouse* plu-

82. *See, e.g.*, Stephens Brief, *supra* note 17, at 4.
83. *Id.* at 17.
84. 518 U.S. at 533.
85. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (plurality opinion).
86. *See id.* at 250–51.
87. *See id.* at 251.

rality simply held that discrimination against women can take the form of expectations that disadvantage them by imposing on them special burdens: "An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind."[88] In other words, Title VII lifts women (and men) out of the bind of a double standard by forbidding employers to impose on men and women unequal burdens.

By contrast, the lawyers for the employees and their amici object to neutral policies that make no generalizations at all about the "talents, capacities, or preferences of males and females"[89] and that place no greater burden on any women compared with men (or vice versa). For instance, the lawyers for Stephens argue that Stephens was fired by Harris Homes "for failing to conform to its sex-based stereotypes about how men and women should identify, appear, and behave."[90] But Harris Homes asked all employees—male and female—to abide by an EEOC-compliant, sex-specific dress code and to use single-sex private facilities that match their sex.[91] This being so, the only way Stephens could prevail is if all sex-specific dress codes and single-sex facilities stem from discriminatory sex stereotyping. They do not.

Nonetheless, the lawyers for Stephens at the Supreme Court contend Harris Homes engaged in discriminatory sex stereotyping by not treating Stephens as a woman: "Just as Price Waterhouse discriminated against Ms. Hopkins because it deemed her insufficiently feminine for a woman, so Harris Homes fired Ms. Stephens because it considered her insufficiently feminine for a woman."[92] But Harris Homes did not consider Stephens's femininity at all—as that is not what determines whether someone is a man or woman. In fact, Harris Homes refused to go along with the stereotype-based determination of sex that Stephens proposed and instead treated Stephens

88. *Id.*

89. *Virginia*, 518 U.S. at 533.

90. Stephens Brief, *supra* note 17, at 16.

91. Brief for the Petitioner at 6–7, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Aug. 16, 2019).

92. Stephens Brief, *supra* note 17, at 31.

in accordance with objective biological realities. It is not that Stephens was "insufficiently feminine"; it is that Stephens is not a woman, and being a woman is not a stereotype.

Stephens argues that any policy that treats sex as a biological matter rather than a self-declared identity is somehow based on a stereotype: "The notion that someone assigned a male sex at birth will identify, look, and behave 'as a man' is undeniably a sex-based stereotype."[93] But Harris Homes makes no assertion about whether Stephens behaves "as" a man; it contends that Stephens is a man, and thus should abide by the EEOC-compliant dress code for men.[94]

The only parties trading in sex stereotypes in these cases are the employees. Stephens tries to drive a wedge between "male" and "man," between "sex assigned at birth" and "gender identity." But it is these distinctions that ultimately rest on stereotypes—according to which gender identity is determined by how one fits or does not fit into prevailing sex stereotypes.[95]

Harris Homes has a simple policy: It treats all males—however they identify, and regardless of their masculinity or femininity—the same way. Likewise, it treats all females the same—however they identify, and regardless of their masculinity or femininity. Nowhere did Harris Homes "generaliz[e] about the different talents, capacities, or preferences of males and females."[96]

Zarda raises a similar argument about sex stereotypes, contending that normative commitments to conjugal sexuality rely on sex stereotypes. Zarda argues, "The notion that men should be attracted only to women and women should be attracted only to men is a normative sex-based stereotype."[97] This is false. Although petitioner Altitude Express denies being motivated by Zarda's sex or sexual orientation at all—it dismissed Zarda for inappropriate conduct with customers[98]—the ques-

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93. *Id.* at 32.

94. *See* EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568 (6th Cir. 2018).

95. *See* ANDERSON, *supra* note 55, at 29–33, 45–48; *see also* Ryan T. Anderson, *The Philosophical Contradictions of the Transgender Worldview*, PUB. DISCOURSE (Feb. 1, 2018), https://www.thepublicdiscourse.com/2018/02/20971/ [https://perma.cc/6LQC-U7HD].

96. United States v. Virginia, 518 U.S. 515, 533 (1996).

97. Zarda Brief, *supra* note 17, at 25.

98. *See* Zarda v. Altitude Express, Inc., 883 F.3d 100, 108 (2d Cir. 2018).

tion of law is straightforward. The conviction that sex belongs in marriage, understood as the conjugal union of spouses who can engage in an act that unites them as one flesh, does not rely on any stereotypes about men and women.[99] It makes no "generalizations about the different talents, capacities, or preferences of males and females" at all.[100] It holds that all male-female couples, regardless of stereotypical attributes of masculinity and femininity, can unite as one flesh. That all male-female couples, regardless of having or not having stereotypical personality traits, can so unite. And that there is intrinsic value in such conjugal marital union.[101]

Because Zarda's employer denies being motivated at all by Zarda's sex or sexual orientation, consider a case where the facts are clear: A Catholic school that dismisses any teacher who has sex outside of marriage, where marriage is understood as the union of husband and wife. Such a policy against sex outside marriage relies on no stereotypes and no double standards. Far from imposing separate standards for "proper female behavior" and "proper male behavior," it imposes exactly the same terms and conditions on members of both sexes. The rationale has nothing to do with male expectations or female expectations, of masculine traits or feminine traits. Rather, it flows from convictions about the good of marriage as a one-flesh union and the role that sexual activity plays in instantiating or impairing that good. In these cases—unlike in *Price Waterhouse*—no expectation particular to one sex (but not the other) is being used to disadvantage one sex (but not the other).

The Supreme Court has been presented with the argument that male-female marriage laws constituted discrimination based on sex in several cases.[102] Not one Justice in any of those cases has ever endorsed this theory, even when it was fully briefed and presented.[103] If the Court repeatedly refused to say

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99. *See* RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 13–35 (2015); SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 23–36 (2012).

100. *Virginia*, 518 U.S. at 533.

101. *See* GIRGIS ET AL., *supra* note 99, at 34–36.

102. *See, e.g.*, Brief for Petitioners at 48–49, Obergefell v. Hodges, 135 S. Ct. 2584 (2015) (No. 14-556); Brief for *Amici Curiae* William N. Eskridge, Jr. et al. in Support of Respondents at 20 n.16, Hollingsworth v. Perry, 570 U.S. 693 (2013) (No. 12-144).

103. *See, e.g.*, *Obergefell*, 135 S. Ct. 2584; United States v. Windsor, 570 U.S. 744 (2013); *Hollingsworth*, 570 U.S. 693.

male-female public marriage laws discriminate on the basis of sex, it should not say that private employment practices based on this understanding of marriage and human sexuality discriminate either. The Court should not now adopt and apply this misguided notion of sex discrimination to private actors based on their "decent and honorable religious or philosophical" convictions about marriage.[104]

Yet, Zarda argues, "Beliefs about sexual orientation are themselves inextricably interrelated to, and indeed premised upon, views about appropriate sex roles and the sexism that often underlies those views."[105] This is a mistake. The core conviction about a man and a woman's ability to unite as one flesh is not premised—in any way, shape or fashion—on social expectations about sex roles.

Professors Eskridge and Koppelman attempt what appears to be a more nuanced argument, noting "the many ways that anti-gay feelings are linked to rigid assumptions about proper sex roles."[106] No doubt there are many ways in which anti-gay bigotry is based on false beliefs about sex roles and sex stereotypes. But the focal case of support for marriage as the union of husband and wife is not anti-gay, entails no bigotry, and is not based on any beliefs about sex roles or sex stereotyping. In every case in which public marriage laws were directly at issue, the Supreme Court refused to say otherwise.[107] Accordingly, it would be a gross mistake for the Court now to pronounce that private citizens' convictions about marriage are, after all, motivated by bigotry.

VI. NO "NEUTRAL" SEX STEREOTYPES ARE TAKING PLACE

The lawyers for the employees and their amici also responded to a defense of sex stereotyping that no one in the cases advanced. According to this hypothetical defense, sex stereotyping is okay provided you make men conform to masculine stereotypes and women conform to feminine stereotypes. But no one made this argument, because no stereotyping at all was taking place. Nevertheless, the lawyers for the employees and their

104. *Obergefell*, 135 S. Ct. at 2602.

105. Zarda Brief, *supra* note 17, at 35–36.

106. Eskridge & Koppelman Brief, *supra* note 37, at 11.

107. *See Obergefell*, 135 S. Ct. 2584; *Windsor*, 570 U.S. 744; *Hollingsworth*, 570 U.S. 693.

amici thought this line of argument dispositive. For example, Zarda contends:

> [A] company that imposes female sex stereotypes on women and male sex stereotypes on men does not thereby insulate itself from liability under Title VII. Consider an employer who has a policy that "All employees shall conform to the stereotypes appropriate to their sex" and fires both a woman like Hopkins for being too "macho" and a man for not being sufficiently "manly." At an artificially high level of abstraction, the conform-to-your-own-sex's-stereotype policy might be said to govern both men and women. Nonetheless, actions pursuant to the policy are both "because of sex"—indeed, explicitly so—and discriminatory.[108]

But no stereotyping at all is taking place in these cases. It is not as if an employer said female (but not male) employees must be docile. Or that men alone are suited for physically demanding jobs. Or that economics is appropriate for boys and home economics appropriate for girls. No, the rule has nothing to do with the relative strengths, weaknesses, character traits, or proper social, economic, or political roles of women as opposed to men. The rule makes no reference to "generalizations about the different talents, capacities, or preferences of males and females."[109] The rule is not that males should abide by stereotypical notions of masculinity and females by stereotypical notions of femininity. Rather, it is that all employees should abide by EEOC-compliant, sex-specific dress codes and use the private facilities that correspond to their sex.[110] This entails no stereotypes, no unequal burdens, no double standards—and as a result, no discrimination. How could it, after all, when Justice Ginsburg stated in her majority opinion that private facilities for each sex are required?[111]

The comparison cases prove the point. Women fired for being too "macho" and men fired for being insufficiently "manly" have been held to two standards: a standard of what women ought to be and a standard of what men ought to be. It can be

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108. Zarda Brief, *supra* note 17, at 38–39.

109. United States v. Virginia, 518 U.S. 515, 533 (1996).

110. Altitude Express denies taking any action at all about Zarda's sex or orientation. But if an employer did have a marital sex policy, it would not be based on stereotypes—neutral or otherwise—as noted above.

111. *See Virginia*, 518 U.S. at 550 n.19.

redescribed as "conform-to-your-own-sex's-stereotype policy." But that redescription hides what is important for the analysis: two separate standards, based on "generalizations about the different talents, capacities, or preferences of males and females,"[112] which create "disparate treatment of men and women"[113] because "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[114]

By contrast, EEOC-compliant dress codes, single-sex private facilities, and marital sexuality provide a single standard for all people. They are not based on any generalizations of talents, capacities, or preferences. To be sure, they can be redescribed as two separate policies—males use the men's room, females use the women's room, males reserve sexual activity for their wives, females reserve sexual activity for their husbands—but those redescriptions hide what is important for the analysis. What is important for the analysis is a single standard equally applied to people of both sexes based on no stereotypes or generalizations at all, and creating no disparate treatment or disadvantageous terms for members of one sex over the other.

The philosophy professors also misunderstand this point:

> Every sex-specific stereotype can be pitched at a higher level of abstraction and achieve the same seemingly "gender-neutral" character. Consider the stereotypes that women ought not be aggressive, or that men ought not be empathetic. Both can be pitched as the single imperative that people ought to be gender conforming.[115]

The relevant question is which level of abstraction brings into focus the true motivating factor of the employment decision. Again, the offered examples prove the opposite point. "Women ought not be aggressive (but men should)" and "men ought not be empathetic (but women should)" highlight two different standards, two different expectations, based on generalizations about the sexes. By contrast: All people should use the restroom

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112. *Id.* at 533.

113. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 78 (1998) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986)) (internal quotation marks omitted).

114. *Id.* at 80 (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

115. Philosophy Professors Brief, *supra* note 32, at 22–23.

and follow the dress code that corresponds with their sex and reserve sexual activity for conjugal marriage. These do not flow from any generalizations about the sexes; they provide one standard for all people, and they do not create a burden for a particular sex while exempting the other. Note that one could not say that with the expectations to be aggressive and to be empathetic. Each of those is based on generalizations about a particular sex and applies to only one of the two sexes.

The employees and their amici assert that a single policy has sex-specific applications—men use the men's room and women use the women's room—and then contend this sex-specific application of a single standard is discriminatory. But that is fallacious. Provided the standard is applied equally, and the facilities and dress codes are comparable, policies that take our sex differences seriously need not entail any discrimination in the relevant sense. When sex differences are relevant, a single standard can have different applications. Only if there is no difference between male and female, or if that difference can never make a policy difference, could the employees' theory succeed. That theory would threaten many people's privacy, safety, and equality. Fortunately, this Court has unanimously ruled that Title VII "requires neither asexuality nor androgyny."[116]

This is why bans on sex discrimination did not abolish sex-specific private facilities (like bathrooms), sex-specific fitness standards (for police and firefighters, for example), or sex-specific athletic competitions (like the NBA and the WNBA). After all, sex-specific bathrooms, fitness standards, and sports leagues do not create disadvantageous conditions. On the contrary, they prevent disadvantageous treatment. That is because they take sex differences seriously where they make a difference, for the sake of privacy and equality.

The simple reality is that just because a policy refers to sex does not mean that it discriminates because of sex. Sex-specific private facilities and dress codes rest on no generalizations about the talents, capacities, or preferences of males and females. They set up no double standard. Nor do they provide disadvantageous terms or conditions to one sex but not the other.

Sex-specific policies do not violate Title VII at all. Although they do distinguish based on sex in their application of a single

116. *Oncale*, 523 U.S. at 81.

policy, they do not "discriminate" provided that they offer comparable programs and facilities to members of each sex.[117] As then-Professor Ginsburg pointed out, taking the demands of privacy and equality seriously does not constitute discrimination.[118] And, as Justice O'Connor reminded us, sex may "always 'play a role' in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion."[119]

The philosophy professors show where their theory leads—to asexuality and androgyny:

> Of course, all gender stereotype enforcement could be described as "sex-neutral" . . . if the stated basis for such enforcement were sufficiently abstract. Suppose an employer terminates *anyone* who violates presentational sex stereotypes . . . . This policy is not sex-neutral even though it can be applied to individuals of all sexes because the only way to apply it is to reference an employee's presumed sex.[120]

Their theory would have the Court strike down as a violation of Title VII all sex-specific dress codes, even those that comply with the EEOC guidelines, simply because they "reference" sex. Again, the theory offered by the employees and amici is simplistic. Not just any reference to sex constitutes discrimination because of sex. Indeed, Justice Kennedy warned the Court not to treat every sexual difference as a stereotype: "To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real."[121]

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117. As we saw above, *see supra* Part IV, to have a meritorious claim of sex discrimination, sex must serve as the "but-for" cause of differential treatment, *and that differential treatment must entail disadvantageous terms or conditions imposed on members of only one sex*.

118. *See* Ginsburg, *supra* note 80, at A21.

119. Price Waterhouse v. Hopkins, 490 U.S. 228, 277 (1989) (O'Connor, J., concurring in the judgment).

120. Philosophy Professors Brief, *supra* note 32, at 11.

121. Tuan Anh Nguyen v. INS, 533 U.S. 53, 73 (2001).

VII. ANALOGY BETWEEN RELIGIOUS CONVERSION AND SEX REASSIGNMENT IS LITTLE MORE THAN WORDPLAY

Stephens and amici make another misguided philosophical move when they compare sex reassignment to religious conversions. On a superficial level, both can be described as changes: changing religions and changing sexes. But Stephens goes further: "Just as firing someone for wanting to change religion is religious discrimination, so too firing a person for wanting to change sex is sex discrimination. In either case, the protected characteristic is a but-for cause of the employment decision."[122]

This superficial parallel—wordplay, really—hides a fundamental difference: religious conversion is an aspect of religion, under the plain meaning of "religion"; but sex reassignment is not an aspect of sex, under the plain meaning of "sex." Consider how the Virginia Declaration of Rights describes religion: "religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence."[123] Where religion is understood as a perceived duty to the Creator and the manner of discharging that duty, it can be directed only by convictions. Those convictions might change, which would then change the manner of discharge. Religious conversion—"changing religions"—is thus an aspect of religion. And the definitions section of Title VII explicitly defines "religion" in an expansive way: "The term 'religion' includes all aspects of religious observance and practice, as well as belief."[124] To convert or to "change" religions are themselves acts of religion. That is, being baptized (converting to Christianity) is a religious act, an aspect of religion.[125]

Sex reassignment procedures, be they social, hormonal, or surgical ("changing sexes"), are not an aspect of sex. In its focal sense, "sex" refers to one's biological organization with respect to sexual reproduction.[126] In a more extended sense, it refers to how one gives expression to that biological organization.[127] But

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122. Stephens Brief, *supra* note 17, at 26.

123. VA. DECLARATION OF RIGHTS § 16 (1776).

124. 42 U.S.C. § 2000e(j) (2018).

125. *See* JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION 131 (2017).

126. *See* ANDERSON, *supra* note 55, at 79–81.

127. *See id.* at 145–73.

nowhere is changing sexes an aspect of sex. So, although being baptized is an aspect of religion for Title VII, engaging in hormone therapy is not an aspect of sex.

Professors Eskridge and Koppelman make a linguistic point but miss the larger, uniquely relevant point. They contend that "Just as it makes no legal difference that 'convert' does not appear in Title VII's text, so it makes no legal difference that 'transgender' does not appear in the statute."[128] But "convert" was understood in 1964 when the Civil Rights Act was passed—as it is today—to be an aspect of religion, and Title VII explicitly defines the protections for religion to include all aspects of religious practice and observance.[129] On the other hand, neither in 1964, nor in 1991 (when the Act was amended),[130] nor today is sex change or transition understood to be an aspect of sex.

In fact, each of those terms is understood in contradistinction to sex. According to the most recent gender theory, sex is merely biological, gender is a social construct, and gender identity is how someone internally perceives their gender.[131] Transitioning and transgender identity are explicitly distinct from sex. This is particularly evident when one considers gender nonbinary identities that have no relation to bodily sex at all.[132] Transitioning and gender identity cannot fairly be described as aspects of sex.

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128. Eskridge & Koppelman Brief, *supra* note 37, at 7.

129. 42 U.S.C. § 2000e(j).

130. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

131. Planned Parenthood, for example, explains this theory on their website, in a section specifically dedicated "For Teens":

> Sex is a label that's usually first given by a doctor based upon the genes, hormones, and body parts (like genitals) you're born with. It goes on your birth certificate and describes your body as female or male. Some people's sex doesn't fit into male or female, called intersex.
>
> Gender is how society thinks we should look, think, and act as girls and women and boys and men. Each culture has beliefs and informal rules about how people should act based on their gender. For example, many cultures expect and encourage men to be more aggressive than women.
>
> Gender identity is how you feel inside and how you show your gender through clothing, behavior, and personal appearance. It's a feeling that begins early in life.

All About Sex, Gender, and Gender Identity, PLANNED PARENTHOOD, https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity [https://perma.cc/A8AL-24GF] (last visited Nov. 7, 2019) (bullets omitted); *see also* ANDERSON, *supra* note 55, at 29–33.

132. *See, e.g.*, Brittany J. Allen, Mandy S. Coles & Gerard T. Montano, *A Call to Improve Guidelines for Transgender Health and Well-being: Promoting Youth-Centered*

VIII. OPPOSITION TO INTERRACIAL MARRIAGE WAS RACE DISCRIMINATION, SUPPORT FOR CONJUGAL MARRIAGE IS NOT SEX DISCRIMINATION

The employees and amici also make a philosophical mistake when they argue that support for conjugal marriage is sex discrimination in the same way that opposition to interracial marriage is race discrimination. For example, Zarda argues:

> This Court has already established that discriminating against someone of a particular race for dating or marrying persons of a different race constitutes discrimination because of race. . . . Discriminating against someone of a particular sex for dating or marrying someone of the same sex constitutes discrimination because of sex.[133]

Yet, when the question of public marriage law was fully briefed and argued in front of the Supreme Court, and this same exact argument was advanced,[134] not one Justice endorsed it.[135]

Zarda phrases the argument with its focal case: "Just as firing a white employee for being married to an African American person constitutes discrimination because of race, so firing a male employee for being married to another man constitutes sex discrimination."[136] But this stops the analysis too soon to determine if discrimination has taken place. One must ask why, in the focal case, people opposed "a white employee for being married to an African American person." The answer has nothing to do with marriage, and everything to do with race: racism and white supremacy.[137] But opposition to same-sex

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and Gender-Inclusive Care, 65 J. ADOLESCENT HEALTH 443, 444 (2019) ("With approximately one-third of TGD [transgender and gender diverse] adults and 40% of TGD youth identifying as nonbinary, care guidelines that reinforce binary systems of gender identity may limit access to clinical services and restrict the ability of nonbinary people to navigate medical systems. Framing gender as solely binary defines therapeutic options and outcomes only in reference to two gender experiences, which impacts access . . . .").

133. Zarda Brief, *supra* note 17, at 12.

134. *See, e.g.*, Brief for Petitioners, *supra* note 102, at 48–49.

135. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015); United States v. Windsor, 570 U.S. 774 (2013); Hollingsworth v. Perry, 570 U.S. 693 (2013).

136. Zarda Brief, *supra* note 17, at 31.

137. *See* Anderson, *supra* note 44, at 132–37.

marriage has nothing to do with sexism or male (or female) supremacy.

When the Supreme Court struck down bans on interracial marriage, it did not praise the motives of those opposed to interracial marriage. It did not, because it could not. Instead, the Court explained that opposition to interracial marriage was part of a larger project of white supremacy.[138] But when the Supreme Court redefined marriage to include same-sex relationships it went out of its way not to cast traditionalists as bigots. Justice Kennedy highlighted, "Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here."[139] Justice Kennedy further noted that that the traditional understanding of marriage "long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world."[140] Nothing remotely similar could be written about antimiscegenation.

The conjugal understanding of marriage could not form a sharper contrast with antimiscegenation. Marriage as the union of male and female has been present throughout human history, shared by the great thinkers and religions and by cultures with diverse viewpoints about homosexuality. Great thinkers—ancient and modern, of both East and West, from Plato and Aristotle, Musonius Rufus and Plutarch, Augustine and Thomas Aquinas, Maimonides and al-Farabi, to Martin Luther and John Calvin, John Locke and Immanuel Kant, Gandhi and Martin Luther King—held the honest and reasoned conviction that male-female sexual bonds had distinctive value for individuals and society.[141] Nothing even remotely similar is true of antimiscegenation.

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138. *See* Loving v. Virginia, 388 U.S. 1, 7 (1967).

139. *Obergefell*, 135 S. Ct. at 2602.

140. *Id.* at 2594.

141. ANDERSON *supra* note 99, at 22, 136; CORVINO ET AL., *supra* note 125, at 196–97; GIRGIS ET AL., *supra* note 99, at 49, 66; *see also* 2 ARISTOTLE, *Nicomachean Ethics bk. VIII*, *in* THE COMPLETE WORKS OF ARISTOTLE 1825, 1836 (Jonathan Barnes ed., Princeton Univ. Press rev. Oxford trans. 1984); 3 PLATO, *The Republic bk. IV*, *in* THE DIALOGUES OF PLATO 107, 112 (B. Jowett trans. & ed., London, Oxford Univ. Press 3d ed. 1892); 1 PLUTARCH, *Solon*, *in* LIVES 405, 459 (Jeffrey Henderson ed., Bernadotte Perrin trans., Harvard Univ. Press, 1914) (c. 75); 9 PLUTARCH, *The Dialogue On Love (Amatorius)*, *in* MORALIA 301, 427 (Jeffrey Henderson ed., Edwin L. Minar, Jr., F.H.

Professors Eskridge and Koppelman disagree. They assume people who enact policies supporting conjugal marriage are really discriminating against homosexuals, which, they assert, is a form of sex discrimination.[142] They accordingly compare those people with an employer who "does not want to hire 'interracial-sexuals'"—meaning "people attracted to persons of another race."[143] Such an employer, they contend, "discriminates because of race in a but-for manner, and it would be no defense . . . to claim it was merely discriminating because of the employee's 'sexual orientation,' namely, the employee's romantic preference for persons of another race."[144] Again, this stops the analysis too soon. And the category "interracial-sexuals" reveals just that. Assuming someone redescribed their opposition to interracial marriage as an objection to "interracial-sexuals," one would have to ask "why" to evaluate it. As a matter of historical reality, opposition to interracial marriage was opposition to equality for blacks.[145] Proponents sought to keep whites and blacks apart, to preserve white purity.[146] It was about racial superiority, not about the nature of marriage or convictions about human sexuality.[147] Indeed, marriage was redefined from its original color-blind reality to exclude interracial couples precisely because of racial bigotry.[148]

By contrast, any reasonable opposition to same-sex sexual activity is grounded in opposition to all nonmarital sexual activity.[149] And here too, Professors Eskridge and Koppelman cut short their analysis. Support for marriage as the conjugal union of husband and wife is not founded on any beliefs about hetero-supremacy or male (or female) supremacy. Nor is opposition on

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Sandbach & W.C. Helmbold trans., Harvard Univ. Press, 1961) (c. 100); MUSONIUS RUFUS, *What is the Chief End of Marriage*, *in* MUSONIUS RUFUS: "THE ROMAN SOCRATES" 89, 89 (Cora E. Lutz ed. & trans., Yale Univ. Press 1947); Alberto Maffi, *Family and Property Law*, *in* THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW 254, 254 (Michael Gagarin & David Cohen eds., 2005).

142. Eskridge & Koppelman Brief, *supra* note 37, at 4–6.

143. *Id.* at 6.

144. *Id.* (citing Loving v. Virginia, 388 U.S. 1, 11 (1967); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Zarda v. Altitude Express, Inc., 883 F.3d 100, 124–25 (2d. Cir. 2018) (en banc)).

145. Anderson, *supra* note 44, at 132–37.

146. *See id.* at 135–37.

147. *Id.* at 132–33, 135.

148. *Id.* at 132–33.

149. *See* ANDERSON, *supra* note 99, at 17–35.

the basis of sex or sexual orientation. Rather, it is founded on the capacity that a man and a woman have to unite as one flesh.[150]

IX. "RACE" AND "SEX" ARE NOT INTERCHANGEABLE IN OUR NATION'S NONDISCRIMINATION LAWS

The preceding section highlights why it is a mistake to treat "race" and "sex" interchangeably in our nation's nondiscrimination laws. As a result of laws banning discrimination because of race, "whites only" water fountains and bathrooms were eliminated.[151] "Negro league" sports teams ceased to exist.[152] No one suggests that race-specific athletic programming or private facilities are appropriate, because race is irrelevant to what we do on the athletic field and in the bathroom. Race-based policies came into practice solely as part of a larger project of white supremacy, where blacks were viewed first as subhuman and then as second class citizens,[153] and where their drinking from the same water fountain and using the same toilet could "pollute" the space.[154] Thus, the separation of the races was premised to keep one race in subjugation. Separate but equal when it came to race was inherently unequal.[155]

A similar argument does not apply when it comes to sex. One aspect of women's equality in the workforce required creating private facilities for women.[156] As a result of laws banning discrimination because of sex, sex-specific restrooms were not eliminated in the workplace.[157] Likewise, bans on sex discrimination in education did not lead to the elimination of women's athletics, but often required creating additional teams and ad-

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150. *See id.*; GIRGIS ET AL., *supra* note 99, at 23–36.

151. J.E. Hansan, *Jim Crow Laws and Racial Segregation*, SOC. WELFARE HIST. PROJECT (2011), https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-andracial-segregation/ [https://perma.cc/FZM4-NWWP].

152. Robert W. Peterson, *Negro League*, ENCYCLOPÆDIA BRITANNICA (May 10, 2018), https://www.britannica.com/sports/Negro-league [https://perma.cc/85R9-3YZS].

153. Anderson, *supra* note 44, at 133–34.

154. *Cf.* Niraj Chokshi, *Racism at American Pools Isn't New: A Look at a Long History*, N.Y. TIMES (Aug. 1, 2018), https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html [https://perma.cc/P78X-ZWT4].

155. *See* Hansan, *supra* note 151.

156. *See* 29 C.F.R. § 1910.141(c)(1)(i) (2012) (requiring employers to maintain restroom facilities for both men and women).

157. *Id.*

ditional sports for women.[158] The bodily differences between males and females make a difference when it comes to bodily privacy and athletic competition, and so laws banning discrimination on the basis of sex did not require the elimination of female-only programs and facilities, but their creation.

Analogies to race-based discrimination are misleading because they obscure the questions that the Court needs to address. The deeper reason for "whites only" water fountains was white supremacy, just as the deeper reason for bans on interracial marriage was white supremacy. In stark contrast, the deeper reason for women's bathrooms and sports teams is not male supremacy. Nor is the deeper reason for conjugal marriage—here and across the globe, today and throughout human history—hetero-supremacy. The deeper reason is based on biological reality and "decent and honorable religious or philosophical premises."[159]

X. THERE WILL BE SEVERE PUBLIC CONSEQUENCES IF THE COURT REDEFINES "SEX" AND EMBRACES A SIMPLISTIC ACCOUNT OF DISCRIMINATION

There will be severe public consequences if the Supreme Court embraces a simplistic theory of "discrimination" and redefines the word "sex" to include "sexual orientation" and "gender identity." Not only would it violate the separation of powers, it would impose enormous liability on employers and unconscionable outcomes on citizens. Enacting a reasonable policy that addresses the needs of all is the responsibility of federal, state, and local legislatures responding to the voice of the people.[160] At any rate, the Civil Rights Act of 1964 does not provide answers to today's questions about sexuality and gender identity. And the Court should not update it, usurping the authority of Congress to provide its own answers. If a simplistic theory of discrimination is embraced and sex is redefined, what else might result?

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158. *See Title IX and the Rise of Female Athletes in America*, WOMEN'S SPORTS FOUND. (Sept. 2, 2016), https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/ [https://perma.cc/V9TD-939E].

159. Obergefell v Hodges, 135 S. Ct. 2584, 2602 (2015).

160. On how these policies should be crafted, see Anderson, *supra* note 30, at 361.

Employers would no longer be allowed to protect their employees' privacy and safety by offering single-sex private facilities. Instead, single-sex facilities would either have to be eliminated because they treat a person's sex as a "but-for" cause to why they cannot enter. Or an employee's entrance would have to be governed based on subjective identity instead of objective biology. Either way, an employer would no longer be able to ensure that a female employee would not be exposed to a male body—which, in its own way, would open employers up to Title VII liability.

Employers would also have to offer benefit plans that would violate their sincerely held religious beliefs. For example, if an employer covers testosterone therapy for men with low testosterone, but declines to cover it for women who want to transition; or if the employer covers mastectomies and hysterectomies in the case of cancer, but not for sex reassignment purposes, such an employer would be liable for discrimination because of sex. Likewise, if an employer offers marriage benefits to employees in conjugal marriages but not to employees in other domestic relationships, this would be viewed as discrimination because of sex. In short, support for the conjugal understanding of marriage would now be viewed as unlawful sex discrimination.[161]

Nor would such a view of sex discrimination be limited to the employment context. After all, how could a new theory of discrimination and a new meaning of the word "sex" be embraced for Title VII but not for other areas of the law, such as Title IX? This view will have consequences for school bathrooms, locker rooms, athletic competitions, dorm rooms, and hotel rooms for overnight field trips. These consequences raise a host of privacy, safety, and equality concerns. The reason we have separate sex-specific private facilities in the first place is not because of "gender identity" but because of the bodily differences between males and females. This privacy concern is particularly acute for victims of sexual assault, who testify that seeing nude male bodies can function as a trigger.[162] As for equality, female athletes are already losing athletic competi-

161. *See generally* ANDERSON, *supra* note 99; CORVINO ET AL., *supra* note 125.

162. *See* Brief of *Amicus Curiae* Safe Spaces for Women Supporting Neither Party at 2, Gloucester Cty. Sch. Bd. v. G.G. *ex rel.* Grimm, 137 S. Ct. 1239 (2017) (No. 16-273).

tions, championships, and recruitment and scholarship opportunities to males identifying as female.[163] And a complaint has already been filed with the Department of Education because a female student was sexually assaulted by a male student in the girls' bathroom.[164] An adverse ruling by the Supreme Court would impose these policies on the entire nation.[165]

Such a ruling would also create particular challenges for faith-based employers and institutions. Faith-based schools would have to provide married student housing to same-sex couples or risk liability for sex discrimination. If they have single-sex dorms, then they would have to allow males who identify as women to live in the women's dorm and vice versa. Faith-based adoption agencies would have to place children with same-sex couples rather than with married mothers and fathers. And although the Ministerial Exception would provide some protection for faith-based institutions to hire for mission,[166] there would be new—endless—litigation challenging adverse employment decisions where staffers do not share the convictions about sexuality.[167] This would also extend to the healthcare domain. Not just about the healthcare benefits that faith-based employers offer their employees, but also what healthcare procedures physicians and hospitals must offer and what insurance must cover.

Redefining "sex" and forming a new approach to discrimination would not be limited to Title VII but would also apply to similar federal laws (such as Title IX as discussed above) and regulations that incorporate or refer to them (such as certain

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163. *See* Samantha Pell, *Girls say Connecticut's transgender athlete policy violates Title IX, file federal complaint*, WASH. POST (June 19, 2019, 7:44 PM), https://www.washingtonpost.com/sports/2019/06/19/girls-say-connecticuts-transgender-athlete-policy-violates-title-ix-file-federal-complaint/ [https://perma.cc/FES2-N2PN].

164. Moriah Balingit, *After alleged sexual assault, officials open investigation of transgender bathroom policy*, WASH. POST (Oct. 9, 2018, 6:43 PM), https://www.washingtonpost.com/local/education/after-alleged-sexual-assault-officials-open-investigation-of-transgender-bathroom-policy/2018/10/09/431e7024-c7fd-11e8-9b1c-a90f1daae309_story.html [https://perma.cc/G2QL-AAA6].

165. *See* Anderson, *supra* note 4, at 318–20.

166. *See* Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 188–90 (2012).

167. *See, e.g.*, John Riley, *Third LGBTQ Catholic school teacher sues Indianapolis Archdiocese for anti-gay discrimination* (Oct. 24, 2019), https://www.metroweekly.com/2019/10/third-catholic-school-teacher-sues-indianapolis-archdiocese-discrimination/ [https://perma.cc/3N3H-T6HJ]; *see also* CORVINO ET AL., *supra* note 125, at 111–21.

Department of Health and Human Services regulations under the Affordable Care Act). To be sure, this new approach would not require all physicians to perform transitions; but a surgeon who performs hysterectomies for cancer would also be required to perform them for sex reassignment purposes, and an endocrinologist who administers testosterone for men with low testosterone would also have to do so for women who want to identify as men.

And because the Court would formulate this approach and not Congress, individual rights and ethics-based professions would immediately come under attack. Without a legislative body that could craft a law that balances competing interests, there would be no exemptions for religious liberty or protections for conscience. Nor would best medical judgments be taken into account. Many doctors, after all, think hormonal and surgical transition procedures are bad medicine.[168] Indeed, many doctors consider the appropriate medical response to gender dysphoria to be one directed at the mind and the emotions, not at the body.[169]

In general, embracing the employees' theory would weaponize the *Obergefell* decision to treat "decent and honorable" disagreement about marriage as sex discrimination.[170] It would treat disagreement about human embodiment as male and female as sex discrimination. And it would turn our nation's cherished civil rights statutes into swords to persecute people with the "wrong" beliefs about human sexuality. Antidiscrimination laws should be understood as shields to protect citizens from unjust discrimination, not as swords to impose a sexual orthodoxy on the nation.[171] The Court should not treat biology as bigotry.

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168. *See The Medical Harms of Hormonal and Surgical Interventions for Gender Dysphoric Children*, HERITAGE FOUND. (Mar. 28, 2019), https://www.heritage.org/gender/event/the-medical-harms-hormonal-and-surgical-interventions-gender-dysphoric-children [https://perma.cc/FZK6-KVBV].

169. *See* Anderson, *supra* note 4, at 309–14, 349–51; *see also* ANDERSON, *supra* note 55, at 132–44.

170. Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015).

171. *See* Anderson, *supra* note 43.