

QUESTIONING THE DEFINITION OF “SEX” IN TITLE VII: *BOSTOCK V. CLAYTON COUNTY, GA*

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INTRODUCTION

In October of 2019, the Supreme Court heard the arguments of two cases presenting the same inquiry: whether Title VII’s prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation.¹ Currently, twenty-one states as well as the District of Columbia expressly prohibit discrimination based on sexual orientation by statute or regulation.² Other states offer protection in the form of agency interpretation or court ruling.³ However, for the remaining states with no established protections, Title VII stands as the only potential safeguard against sexual orientation discrimination.⁴

The following Commentary considers the case of Gerald Bostock, a gay man from the state of Georgia who was fired from his job in 2013.⁵ The Eleventh Circuit held that Title VII does not prohibit discrimination based on sexual orientation, but Bostock appealed the case and was granted certiorari. The Supreme Court consolidated this case with *Altitude Express Inc. v. Zarda* and allotted a single hour for oral argument that took place on October 8, 2019.⁶ The Supreme Court

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1. Loren AliKhan, *Symposium: A Trio of Cases, a Lot at Stake*, SCOTUSBLOG (Sept. 9, 2019, 3:26 PM), <https://www.scotusblog.com/2019/09/symposium-a-trio-of-cases-a-lot-at-stake/>.

2. *Id.*

3. *Id.*

4. *Id.*

5. *Bostock v. Clayton County*, OYEZ, <https://www.oyez.org/cases/2019/17-1618> (last visited Oct. 1, 2019).

6. *Gerald Lynn Bostock v. Clayton County, Georgia*, FREEDOM FOR ALL AMERICANS, <https://www.freedomforallamericans.org/gerald-lynn-bostock-v-clayton-county-georgia/#targetText=Gerald%20Lynn%20Bostock%20v.%20Clayton,arguments%20applies%20to%20sexual%20orientation> (last visited Oct. 1, 2019). *Altitude Express Inc. v. Zarda* is a Second Circuit case presenting the same issue. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

is expected to come to a decision in the first half of 2020.⁷ The Court will decide whether to expand the definition of the term “sex” in Title VII to include sexual orientation, which is a desirable policy on its face.⁸ Discrimination in the workplace—based on anything other than work performance—is not only archaic, but abhorrent. A redefinition of the term “sex” would also help resolve the circuit court split on the issue. However, these cases might instead push the Supreme Court to make a more consequential decision, one stretching the bounds of Constitutional separation of powers.⁹

I. FACTS

In 2003, Gerald Lynn Bostock began working for Clayton County, Georgia, as the Child Welfare Services Coordinator assigned to the Juvenile Court.¹⁰ Bostock was given primary responsibility for the Court Appointed Special Advocates program (“CASA”) in which he advocated for the interests of at-risk youth in the juvenile court system.¹¹ During his tenure, Bostock received favorable performance reviews and Clayton County’s CASA program received the 2007 Program of Excellence Award from Georgia CASA.¹² Furthermore, Bostock was asked to serve on the National CASA Standards and Policy Committee in both 2011 and 2012.¹³

Bostock identifies as gay and, in January 2013, he began participating in a gay recreational softball league.¹⁴ Bostock claims that during the following months, individuals with significant influence on Clayton County’s decision making openly criticized Bostock’s participation in the league as well as his sexual orientation.¹⁵ In April 2013, Clayton County initiated an audit of its CASA program funds, which Bostock managed.¹⁶ Bostock claims the audit was unwarranted and was prompted due to his sexual orientation and failure to conform

7. *Id.*

8. Andrée Blumstein, *Symposium: How the Title VII Trilogy May Test the Court*, SCOTUSBLOG (Sept. 5, 2019, 11:30 AM), <https://www.scotusblog.com/2019/09/symposium-how-the-title-vii-trilogy-may-test-the-court/>.

9. *Id.*

10. Petition for Writ of Certiorari, *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (June 26, 2019) (No. 17-1618) [hereinafter *Petitioner’s Writ of Cert.*].

11. *Id.*

12. *Id.* at 4–5.

13. *Id.* at 5.

14. *Id.*

15. *Id.* at 5.

16. *Id.*

to gender stereotypes.¹⁷ Bostock also asserts that members of the Friends of Clayton County CASA Advisory Board disparaged his sexual orientation and that his participation in the softball league was criticized during one of their meetings.¹⁸

On June 3, 2013, Bostock was fired from his position as Child Welfare Services Coordinator.¹⁹ Clayton County stated that Bostock mismanaged CASA funds and thus terminated him for “conduct unbecoming of a county employee.”²⁰ Bostock now claims that his termination was a result of discrimination based on “sex” in violation of Title VII of the Civil Rights Act of 1964.²¹ Clayton County contends that, even if Bostock’s claim was true, Bostock has no actionable Title VII claim because the statute does not extend to discrimination based on sexual orientation.²²

II. PROCEDURAL HISTORY

Bostock filed a charge with the Equal Employment Opportunity Commission. In return, the EEOC issued a “right to sue” letter, stating he had a potentially legitimate discrimination claim.²³ He then filed a *pro se* action against Clayton County in the United States District Court for the Northern District of Georgia.²⁴ Clayton County moved to dismiss the complaint on September 26, 2016.²⁵ It argued Title VII does not prohibit discrimination based on sexual orientation.²⁶ The County also argued the complaint did not adequately allege a claim of gender stereotyping.²⁷

On November 3, 2016, the magistrate judge recommended dismissal on Bostock’s claim.²⁸ The judge held that Title VII does not cover claims of sexual orientation discrimination, applying Fifth Circuit precedent set in *Blum v. Gulf*.²⁹ The judge noted the EEOC now

17. *Id.*

18. *Id.* at 6.

19. *Id.* at 5.

20. *Id.* at 5–6.

21. Brief for Petitioner at 2, *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (Sept. 10, 2019) (No. 17-1618) [hereinafter Reply Brief for Petitioner].

22. Petitioner’s Writ of Cert., *supra* note 10, at 6–9.

23. Brief for Respondent at 3, *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (Aug. 16, 2019) (No. 17-1618) [hereinafter Brief for Respondent].

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 7–8.

28. *Id.* at 3.

29. *Id.*; *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (per curiam). Geographically,

interprets Title VII to encompass sexual orientation discrimination, but reasoned a district court should not defer to the EEOC's determinations over the precedent set by *Blum*.³⁰ The judge also recommended dismissal of Bostock's gender stereotyping claim.³¹

Bostock objected to the magistrate judge's recommendation, but consideration of the case was deferred until the Eleventh Circuit issued a decision in *Evans v. Georgia Regional Hospital*.³² The Eleventh Circuit issued its decision on *Evans* on March 10, 2017,³³ holding that *Blum* remained binding precedent in the Eleventh Circuit³⁴ and that Title VII does not prohibit discrimination on the basis of sexual orientation.³⁵ In light of this, the district court dismissed Bostock's gender stereotyping claim and accordingly entered a judgment in favor of Clayton County.³⁶ Bostock appealed to the Eleventh Circuit.³⁷ Bostock also filed a preliminary petition for rehearing *en banc*.³⁸ The Eleventh Circuit denied Bostock's preliminary petition and affirmed the district court's decision.³⁹

In its opinion, the Eleventh Circuit looked to both *Blum* and *Evans* as precedent, holding that Title VII does not prohibit discrimination based on sexual orientation.⁴⁰ The court rejected Bostock's argument that the Supreme Court's decisions in *Sundowner* and *Price Waterhouse* support Title VII claims for sexual orientation discrimination.⁴¹ The Eleventh Circuit determined that its own precedent was too compelling to agree with Bostock's arguments, stating: "Our holding in *Evans* forecloses Bostock's claim. And under our prior panel precedent rule,

the Eleventh Circuit was originally part of the Fifth Circuit, but split off to form the Eleventh Circuit effective October 1, 1981. For this reason, Fifth Circuit decisions from before this split are considered binding precedent in the Eleventh Circuit.

30. Petitioner's Writ of Cert., *supra* note 10, at 6; *Blum*, 597 F.2d 936; Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641 (July 15, 2015).

31. Petitioner's Writ of Cert., *supra* note 10, at 7.

32. *Id.*; In *Evans*, the Eleventh Circuit considered the same issue, whether sexual orientation discrimination was actionable under Title VII. *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

33. *Evans*, 850 F.3d at 1248.

34. *Id.* at 1255.

35. Petitioner's Writ of Cert., *supra* note 10, at 5.

36. *Id.*

37. *Id.*

38. *Id.* at 5.

39. *Id.* at 6; Bostock v. Clayton Cty. Bd. of Comm'rs., 723 F. App'x 964, 964-65 (11th Cir. 2018) (denying preliminary petition for rehearing *en banc*).

40. *Id.*

41. *Id.*; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989).

we cannot overrule a prior panel’s holding, regardless of whether we think it was wrong, unless an intervening Supreme Court or Eleventh Circuit *en banc* decision is issued.”⁴²

However, there was not unanimity among the Eleventh Circuit panel when they issued their decision.⁴³ Judge Rosenbaum filed a contemptuous dissent, arguing for the case to be reheard:⁴⁴

The issue this case raises—whether Title VII protects gay and lesbian individuals from discrimination because their sexual preferences do not conform to their employers’ views of whom individuals of their respective genders should love—is indisputably *en-banc*-worthy. . . . I cannot explain why a majority of our Court is content to rely on the precedential equivalent of an Edsel with a missing engine, when it comes to an issue that affects so many people.⁴⁵

She scolded the court for clinging to aged precedent and argued that the Eleventh Circuit was leaving a large portion of the population vulnerable to sexual orientation discrimination. The court denied Judge Rosenbaum’s plea to rehear the case.⁴⁶

Bostock filed his petition for writ of certiorari on June 1, 2018.⁴⁷ On April 22, 2019, the Petition was granted.⁴⁸

III. LEGAL BACKGROUND

A. *The Circuit Court Split*

Prior to 2017, at least nine federal circuit courts had ruled that sexual orientation is not covered under the term “sex” in Title VII of the 1964 Civil Rights Act.⁴⁹ However, in the last few years, courts have begun to split on the issue.⁵⁰ In 2015, the EEOC started the shift in interpretation with the *Baldwin v. Foxx* ruling, stating that Title VII

42. *Bostock*, 723 Fed. App’x. at 965.

43. *Bostock v. Clayton Cty. Bd. of Comm’rs*, 894 F.3d 1335, 1336 (11th Cir. 2018) (Rosenbaum, J., dissenting).

44. *Id.* at 1336.

45. *Id.* at 1336–37.

46. *Id.* at 1335.

47. Petitioner’s Writ of Cert., *supra* note 10, at 5.

48. *Bostock v. Clayton Cty., Ga.*, 139 S. Ct. 1599 (2019) (No. 17-1618).

49. Robert Iafolla, *Supreme Court Can Settle Split on LGBT Bias in the Workplace*, BLOOMBERGLAW (Apr. 22, 2019, 9:54 AM), <https://news.bloomberglaw.com/daily-labor-report/supreme-court-can-settle-split-on-lgbt-bias-in-the-workplace>.

50. *Id.*

does apply to sexual orientation.⁵¹ Although the decision was not binding precedent, it sparked a new wave of reinterpretation of the term “sex” in Title VII.⁵²

The first federal appeals court to reinterpret the meaning of “sex” in Title VII was the Seventh Circuit in 2017.⁵³ In *Hively v. Ivy Tech Community College of Indiana*, the Seventh Circuit held in an 8-3 decision that workplace discrimination based on sexual orientation violated Title VII.⁵⁴ *Hively* was a landmark case, overturning Seventh Circuit precedent.⁵⁵ The Second Circuit quickly followed suit in 2018 with *Zarda v. Altitude Express, Inc.*⁵⁶

In 2017, the Eleventh Circuit came to the opposite conclusion, holding that sexual orientation discrimination was not covered under Title VII.⁵⁷ The court reasoned that “[b]ecause Congress has not made sexual orientation a protected class, the appropriate venue for pressing the argument raised by the Commission and the dissent is before Congress, not this Court. And for decades, members of Congress have introduced bills for that purpose.”⁵⁸ The court refused to infringe on what it believed to be Congress’s legislative power in deference to precedent set forth in *Blum v. Gulf Oil Corp.*⁵⁹

B. *The Supreme Court and Gender-Stereotyping Distinction*

In 1989, the U.S. Supreme Court held in *Price Waterhouse v. Hopkins* that, when an employer relies on sex-based considerations or takes gender into account when taking an employment-related action, it violates Title VII.⁶⁰ In *Price Waterhouse*, plaintiff Ann Hopkins sued

51. *Id.*

52. Erin Connell & Kathryn Mantoan, *EEOC Rules that Sexual Orientation Discrimination is Sex Discrimination Under Title VII*, ORRICK (July 28, 2015), <https://blogs.orrick.com/employment/tag/baldwin-v-foxx/>.

53. Iafolla, *supra* note 49; *Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339 (7th Cir. 2017).

54. *Hively*, 853 F.3d at 339.

55. Iafolla, *supra* note 49.

56. *Id.*; *Zarda v. Altitude Express, Inc.*, 883 F.3d 100 (2d Cir. 2018).

57. *Litigation Tracker: Eleventh Circuit*, FREEDOM FOR ALL AMERICANS, <https://www.freedomforallamericans.org/category/circuit-courts/eleventh-circuit/> (last visited Oct. 1, 2019); *Evans v. Ga. Reg'l. Hosp.*, 850 F.3d 1248, 1256 (11th Cir. 2017).

58. *Evans*, 850 F.3d at 1261.

59. *Id.*; *Litigation Tracker: Eleventh Circuit*, *supra* note 57. Although *Blum* is a 1979 Fifth Circuit holding, the Eleventh Circuit is bound by it because it was part of the Fifth Circuit until 1981.

60. Jenny Yang, *Does the law protect the LGBTQ community from discrimination? It should be an easy answer.*, WASH. POST (Apr. 26, 2019), <https://www.washingtonpost.com/opinions/2019/04/26/does-law-protect-lgbtq-community-discrimination-it-should-be-an-easy-answer/>.

her employer for sex-based discrimination after she was denied a promotion to partnership.⁶¹ A statement considering her fitness for the promotion contained various comments noting her poor interpersonal skills and masculinity, as well as objections to her use of profanity as a female.⁶² The Supreme Court held that Hopkins' employer had made an employment decision based on Hopkins's failure to conform to gender stereotypes, which constituted discrimination based on sex under Title VII.⁶³ Furthermore, the Court held that a Title VII pleading does not require that gender be the "but-for" cause of an employment decision.⁶⁴ An employee must merely show that gender was a motivating factor in an employment decision to have a colorable Title VII claim.⁶⁵ In 1991, Congress enacted the Civil Rights Act Amendment, codifying this lesser causation standard.⁶⁶

In the 1998 case *Oncale v. Sundower*, the Court unanimously agreed that Title VII prohibits the entire spectrum of sex-based discrimination, including same-sex harassment.⁶⁷ The plaintiff, Joseph Oncale, brought a Title VII claim against his employer after he quit his job due to workplace harassment from a person of the same sex.⁶⁸ The Court held that Title VII's protection against discrimination on the basis of sex applies to both men and women, and there was no basis to support the contention that Title VII categorically bars discrimination claims "because of sex" when the employer and employee in question are members of the same sex.

Even though the Supreme Court has been forced to interpret Title VII on multiple occasions, it has never specifically determined whether the term "sex" encompasses sexual orientation. However, Justice Scalia did call for a common-sense approach in adjudicating Title VII cases, requiring that the justices take into account "social context" when making their decisions.⁶⁹ In *Sundower*, Scalia wrote that "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."⁷⁰

61. Price Waterhouse v. Hopkins, 490 U.S. 228, 231–32 (1989).

62. *Id.* at 234–35.

63. *Id.* at 257–58.

64. *Id.* at 240–41.

65. *Id.* at 250.

66. Petitioner's Writ of Cert., *supra* note 10, at 39.

67. *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

68. *Id.* at 76–77.

69. *Id.* at 82.

70. *Id.* at 79.

IV. ARGUMENTS

A. *Petitioner's Arguments*

Bostock's argument that the Title VII definition of "sex" ought to protect against discrimination based on sexual orientation is segmented into three primary sections.⁷¹ First, the Petitioner looks to the "plain language of Title VII," arguing that sexual orientation discrimination is a form of sex discrimination.⁷² Second, he argues that the statutory history of Title VII and the Supreme Court's historic willingness to broadly interpret the term "sex" supports including sexual orientation discrimination in Title VII.⁷³ Lastly, the Petitioner argues that, if the Supreme Court were to interpret Title VII to not cover sexual orientation discrimination, it would create conflicts of interpretation affecting various parts of the statute.⁷⁴ For purposes of this commentary, the following section considers only the first two sections of the petitioner's argument.

1. Statutory Interpretation: The Language of Title VII

The first portion of the Petitioner's argument analyzes the statutory language—specifically, the phrase "because of sex"—to determine its scope.⁷⁵ The Petitioner asserts that sexual orientation is necessarily a sex-based classification.⁷⁶ The dictionary definitions of the term "homosexual" require reference to use of the term "sex."⁷⁷ The Petitioner points to Webster's Dictionary definition of "homosexual" as "of, relating to, or characterized by a tendency to direct sexual desire toward another of the same sex."⁷⁸ Petitioner contends the dictionary definitions make it clear that sexual orientation cannot be defined or determined without first taking an individual's sex into account.⁷⁹ Because the *Price Waterhouse* holding forbids employers from relying on any sex-based considerations in making employment decisions, the Petitioner reasons that the Court should similarly forbid sexual

71. Petitioner's Writ of Cert., *supra* note 10, at iii-v.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 13.

77. *Id.*

78. *Id.* (quoting *Homosexual*, Webster's New International Dictionary (3d ed. 1961)). The Petitioner uses the 1961 version of Webster's Dictionary because this was the version used when Title VII was drafted.

79. *Id.* at 13-14.

orientation discrimination because it necessarily rests on a sex-based consideration.⁸⁰

The Petitioner then considers the Respondent's likely counterargument that homosexuality does not rest on a sex-based consideration because sexual orientation is not "*inextricably linked*" to sex.⁸¹ Both men *and* women can be homosexual, so the discrimination is not truly class-based and thus is not actionable under Title VII.⁸² The Petitioner rebuts this, relying on *Price Waterhouse*. In deciding Title VII cases, the Supreme Court uses a classification-based, not a class-based, approach, which focuses on fairness to individuals rather than disparate treatment of classes.⁸³ For instance, in *Price Waterhouse*, the Court held that the employer's action based on a belief that the female plaintiff ought to wear jewelry was impermissibly sex-based.⁸⁴ Discrimination based on sexual-orientation qualifies as "discrimination 'because of sex,' because an employer must consider the employee's sex . . . [and then in turn] treats the employee differently than it would if she or he were the opposite sex."⁸⁵

Similarly, the Petitioner asserts that sexual orientation discrimination is a form of associational sex discrimination, meaning that the discrimination is derived from the employee's association with another person of the same sex.⁸⁶ Associational discrimination was first addressed by Congress in the 1960s as it pertained to race, but has expanded to other contexts since then.⁸⁷ Applied to the facts of this case, this means that discrimination against a person because of the sex of another person with whom they are associated is, in turn, to discriminate against him because of his sex.⁸⁸ Of the five circuit courts to consider the issue, all have unanimously agreed that "the prohibition on associational discrimination applies with equal force to all classes protected by Title VII, including sex."⁸⁹ According to the Petitioner, these cases provide guidance for the statutory interpretation in this

80. *Id.* at 14.

81. *Id.* at 15 (emphasis added).

82. *Id.* at 15–16.

83. *Id.* at 16. The Petitioner argues the Court focuses on fairness to individuals rather than classes as a whole.

84. *Id.* at 17.

85. *Id.* at 17–18.

86. *Id.* at 18.

87. *Id.*

88. *Id.* at 20.

89. *Id.* at 19. (citing *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 124 (2d Cir. 2018)).

case.⁹⁰ The cases' logic points to the absence of a "principled reason why the associational theory of discrimination should not also apply to sex discrimination under Title VII."⁹¹

Price Waterhouse established that sex stereotype discrimination is unlawful, as it is "because of sex" discrimination under Title VII.⁹² The Petitioner argues that sexual orientation discrimination is a form of sex stereotype discrimination because sexual orientation discrimination arises from a failure to conform to sex-based stereotypes.⁹³ The Petitioner also argues the Supreme Court's consistent understanding of sex as gender, which includes an individual's conformity (or lack thereof) with expected gender social roles, must necessarily protect LGBTQ employees from discrimination under Title VII, given identical existing protection for conformity (or lack thereof) with expected gender roles.⁹⁴ As the Second Circuit reasoned in *Zarda*, when an employer acts on a belief that a female or male should not be attracted to another female or male, respectively, the employer has acted on the basis of gender.⁹⁵ In *Oncale*, the court broadly interpreted "because of sex" to encompass all forms of discrimination that Congress might not have contemplated when it passed Title VII.⁹⁶ This logic applies just as forcefully to sexual orientation.⁹⁷

2. The Statutory History of Title VII

The Petitioner begins this portion of his argument by noting that, even in 1964, the Webster-Dictionary definition of "sex" included all behavior between individuals, regardless of sexual orientation.⁹⁸ Thus, the Petitioner argues that the Civil Rights Act accordingly uses the term "sex" to include more protection for all individuals regardless of the gender of sexual partners.⁹⁹ The Supreme Court has previously held that statutory language is flexible in interpretation and scope as new scenarios arise and old applications become anachronistic.¹⁰⁰

90. *Id.* at 19–20.

91. *Id.*

92. *Id.* at 24.

93. *Id.* at 23–24.

94. *Id.* at 27.

95. *Id.*

96. *Id.* at 30.

97. *Id.*

98. *Id.* at 32.

99. *Id.* at 32–33.

100. *Id.* at 33 (citing *West v. Gibson*, 527 U.S. 212, 218 (1999)).

Unlike the enumerated protections for race, color, religion, and country of origin under Title VII, the “sex” class was a last-minute addition, which leaves little legislative history to guide the Court in its interpretation.¹⁰¹ However, Congress stated in 1972 that sex discrimination was “no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct.”¹⁰² In 1978, Congress took measures to extend the protections offered by Title VII by passing the Pregnancy Discrimination Act of 1978.¹⁰³ The amendment made discrimination against “women affected by pregnancy, childbirth, or related medical conditions” unlawful.¹⁰⁴ The purpose of the Pregnancy Discrimination Act was to broaden the definition of sex discrimination in Title VII to ensure that individuals are protected against *all types* of employment discrimination based on sex.¹⁰⁵

Congress passed this Act in response to the Supreme Court’s narrow definition of “sex” under Title VII in *General Electric v. Gilbert*, holding that discrimination on the basis of pregnancy was permitted even though only women can become pregnant.¹⁰⁶ The Act indicated that Congress itself intended the statutory ban on sex discrimination in Title VII to be interpreted broadly to prevent discrimination due to any sex-based classifications.¹⁰⁷

After 1978, Congress left the Court to interpret the “because of sex” clause with no further legislative clarification.¹⁰⁸ The Supreme Court ruled on a number of Title VII cases, including *Price Waterhouse*, in which they broadly interpreted the “because of sex” provision.¹⁰⁹ These Title VII interpretations indicated that the clause was not limited to forms of sex discrimination recognized at the time of its enactment—that is, biological sex.¹¹⁰ In 1991, Congress confirmed and codified a lessened causation standard for Title VII in the Civil Rights Act.¹¹¹ This standard provided that a violation of Title VII is shown by proof that sex or another protected characteristic was a motivating factor for any

101. *Id.* at 34.

102. *Id.* (citing S. REP. NO. 92-415, at 7 (1971)).

103. *Id.* at 35.

104. *Id.* (citing the Pregnancy Discrimination Act, 42 U.S.C. § 2000e-2(k) (1978)).

105. *Id.* (citing S. REP. NO. 95-331 at 2–3, H.R. REP. NO. 95-948 at 3–4).

106. *Id.* at 34.

107. *Id.* at 36.

108. *Id.* at 37.

109. *Id.* at 37–38.

110. *Id.* at 39–40.

111. *Id.* at 39.

employment practice (even when considered with other legitimate, unenumerated factors).¹¹² The 1991 amendment passed without changing the “because of sex” clause, indicating congressional approval of the Supreme Court’s “motivating factor” doctrine.¹¹³

In 1998, the Supreme Court unanimously decided *Oncale v. Sundower Offshore Services*, holding that the language of Title VII extends beyond the types of discrimination that Congress considered in 1964.¹¹⁴ Thus, Petitioner argues, Title VII encompasses sexual orientation discrimination because it is described by the plain statutory language and “there is no difficulty in interpreting the statute to reach more broadly than Congress may have expected in 1964.”¹¹⁵

B. Respondent’s Arguments

The Respondent’s argument is segmented into five sections. For purposes of this commentary, this section will only consider two of the five arguments.¹¹⁶ First, the Respondent addresses the original public understanding of “sex” as used in Title VII.¹¹⁷ Second, the Respondent addresses the legislative developments that confirm that Title VII does not include sexual orientation as a protected class.¹¹⁸

1. The 1964 Definition of “Sex”

The Respondent’s argument begins by addressing the original meaning of “sex” as it was commonly understood when Title VII was written in 1964, arguing that it prohibits discrimination on the basis of sex, but not sexual orientation.¹¹⁹ The Respondent notes that the Court has repeatedly interpreted statutes applying their original public meaning, stating that “words generally should be ‘interpreted as taking their ordinary, contemporary, common meaning.’”¹²⁰ The Respondent argues that “contemporary” refers to the time in which the statute was enacted, which is 1964 for the Civil Rights Act. This allows the public to understand the legislation as Congress, not the courts, intended. The Respondent states that the Petitioner’s argument that statutory

112. *Id.*

113. *Id.*

114. *Id.* at 44 (citing *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75 (1998)).

115. *Id.* at 45.

116. Brief for Respondent, *supra* note 23, at i-iv.

117. *Id.*

118. *Id.*

119. *Id.* at 10.

120. *Id.* at 10 (quoting *Wisc. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2074 (2018)).

language ought to be flexible only applies in scenarios when there has been later statutory authorization to alter the interpretation of a statute's language.¹²¹

The Respondent continues by explaining that the 1964 ordinary meaning of the term “sex” was biological sex, thus not covering sexual orientation or homosexuality.¹²² As noted in the Petitioner's brief, the term “sex” was a last minute addition to Title VII, so there is little legislative history to guide the Court's interpretation of this term.¹²³ In the absence of such guidance, the Respondent reasons, returning to the ordinary meaning of the term is appropriate.¹²⁴ To do this, the Respondent turns to the 1964 dictionary definition of the term and compares it to the modern definition.¹²⁵ The phrase “sexual orientation” does not appear in either definition.¹²⁶ The Respondent states that the Petitioner's attempt to include “behavior” as part of the definition of the term is inappropriate, as the other enumerated categories of Title VII protect certain characteristics, not behaviors.¹²⁷ Thus, the Respondent argues, Title VII only prohibits employment discrimination on the basis of biological sex, not on the basis of sexual orientation.¹²⁸

2. Legislative Developments Regarding Title VII

The Respondent notes that Congress has repeatedly chosen not to adopt proposed legislation that would have added sexual orientation as a protected class under Title VII.¹²⁹ Since 1974, there have been fifty proposed bills in this category, including the Equality Act of 2019, which has not yet passed the Senate.¹³⁰ The Respondent refers to the Petitioner's argument that Congress has not amended Title VII to include sexual orientation because it *already* includes sexual orientation as a protected class as “preposterous,”¹³¹ because circuit courts and the EEOC have held otherwise for decades.¹³² According to

121. *Id.* at 12.

122. *Id.*

123. *Id.* at 13.

124. *Id.*

125. *Id.* at 13-14.

126. *Id.* at 14.

127. *Id.* at 15.

128. *Id.* at 15-16.

129. *Id.* at 47.

130. *Id.* at 47-48.

131. *Id.* at 48.

132. *Id.* at 48-49.

the Respondent, the number of bills introduced over the past forty-five years seeking to amend Title VII to add sexual orientation as a protected class demonstrate that Congress is aware that this class has been left unprotected by Title VII.¹³³

The Respondent further argues that by enacting the Civil Rights Act of 1991, Congress incorporated the decisions of the EEOC and circuit courts holding that Title VII does not prohibit discrimination on the basis of sexual orientation.¹³⁴ The Respondent states that Congress incorporated the EEOC's longstanding interpretation that Title VII does not prohibit sexual orientation discrimination by including the same language as Title VII in the Civil Rights Act of 1991.¹³⁵ The Supreme Court has stated that if "a word or phrase has been . . . given a uniform interpretation by inferior courts . . . a later version of that act perpetuating the wording is presumed to carry forward in that interpretation."¹³⁶ In 1991, every federal court of appeals to consider the issue had held that Title VII does not prohibit discrimination on the basis of sexual orientation.¹³⁷ Thus, the Respondent reasons, the Court ought to find that Congress carried forward prior judicial interpretation of the term "sex" within Title VII when it used identical language in the Civil Rights Act of 1991.¹³⁸

The Respondent points out that Congress has included sexual orientation as a protected class in addition to sex or gender in various civil rights statutes and other statutes enacted between 1998 and 2013, such as the Violence Against Women Act. These recent statutes in which Congress has specifically enumerated "sexual orientation" as a protected class indicate Congress's awareness and acknowledgment of the distinction between "sex" and "sexual orientation."¹³⁹

V. ANALYSIS

A. *The Historic Textualist v. Purposivist Approaches*

Statutory interpretation has long been divided into two broad

133. *Id.* at 49–50.

134. *Id.* at 51.

135. *Id.* at 52.

136. *Id.* at 52 (citing *Tex. Dep't. of Hous. & Cmty. Affairs v. Inclusive Cmty. Project, Inc.*, 135 S. Ct. 628, 633–34 (2019)).

137. *Id.* at 52–53.

138. *Id.* at 53–55.

139. *Id.* at 56–57.

categories: textualism and purposivism.¹⁴⁰ Purposivists appreciate the “spirit rather than the letter of the law,” and approve of judicial interpretation with the objective purpose of the legislature in mind.¹⁴¹ In contrast, textualists emphasize that judges should *not* give effect to the un-enacted evidence of legislative purpose.¹⁴² Here, the only language for the Court to interpret is the term “sex.” If you had asked the Civil Rights Act drafters specifically whether they intended for the term “sex” to encompass gender and sexual orientation discrimination, they would likely be unaware why such a question was being posed.¹⁴³ White women pushed for the term “sex” to even be included for their own protection in the workplace.¹⁴⁴ In 1964, LGBTQ rights and anti-discrimination measures were not contemplated by legislators. From a textualist approach, this would mean that “sex” strictly means biological sex. However, society has progressed to a point that the term requires a much broader interpretation.

With no protection in place against sexual orientation discrimination in the workplace in numerous states, the Supreme Court should interpret “sex” to encompass sexual orientation. This would require somewhat of a purposivist approach, but not one that requires an unprecedented level of implied interpretation. The underlying purpose of Title VII is to ban employer discrimination based on anything other than work performance. In this particular case, Bostock was an outstanding employee and his sexual orientation contributed to his termination.¹⁴⁵ He and other members of the LGBTQ community deserve protection from unjust discrimination.

The Supreme Court already crossed the line into purposivist interpretation in both *Oncale* and *Price Waterhouse*.¹⁴⁶ In *Price Waterhouse*, Title VII was found to protect against discrimination based on a failure to conform to gender stereotypes.¹⁴⁷ And, in *Oncale*, Title VII was found to protect against the “entire spectrum” of sex-based

140. See John Manning, *What Divides Textualists from Purposivists?*, 106 COLUM. L. REV. 70, 70–111 (2006) (describing the differences between textualists and purposivists).

141. *Id.*

142. *Id.*

143. Garrett Epps, *Why ‘Because of Sex’ Should Protect Gay People*, THE ATLANTIC (Sept. 29, 2019), <https://www.theatlantic.com/ideas/archive/2019/09/title-vii-should-protect-gay-people/598825/>.

144. *Id.*

145. Petitioner’s Writ of Cert., *supra* note 10, at 4–6.

146. *Oncale v. Sundower Offshore Servs., Inc.*, 523 U.S. 75 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

147. Yang, *supra* note 60.

discrimination.¹⁴⁸ The Supreme Court has already given Title VII meaning beyond the explicit language. This interpretation of “sex” to include sexual orientation would align with the original purpose of Title VII and give LGBTQ employees protection. As Justice Scalia wrote in *Oncale*, and as the Petitioner points out, the Court must interpret Title VII to prohibit some forms of sex discrimination that simply were not considered in 1964.

Although the Respondent argues that the interpretations from *Price Waterhouse* and *Oncale* still align with the 1964 definition of “sex,” both parties seem to agree that cases of homosexuality and sex stereotyping were likely not even considered in 1964, because the protection against “sex” discrimination was a last-minute addition. Interpreting “because of sex” to extend to sexual orientation does not require an abrogation of its original definition; it merely requires an extension of the definition to cover traits that are necessarily affiliated with sex, such as sexual orientation. This strongly parallels the Supreme Court’s logic in *Price Waterhouse* by construing “because of sex” to cover sex stereotypes.

B. Policy Implications

The House of Representatives has recently found that, in the absence of explicit laws against sexual orientation discrimination, there is some level of uncertainty for employers.¹⁴⁹ In response, the House passed the Equality Act of 2019 to expand the definition of Title VII to include sexual orientation within the meaning of sex.¹⁵⁰ However, this was too late for the number of LGBTQ employees who have already experienced discrimination in the workplace due to their sexual orientation. There is not a failure on Congress’ part to recognize that LGBTQ employees deserve equal rights; as the Respondent notes, there have been numerous proposed amendments to amend this section of Title VII. However, there has been a failure by Congress to act in time to provide appropriate legislative protection for these individuals.

In an ideal world, Congress would have amended Title VII some time ago instead of forcing the Supreme Court to interpret an older piece of legislation that does not always appropriately apply to modern

148. *Id.*

149. Blumstein, *supra* note 8.

150. *Id.*

social constructs. There are some circuit judges (and Supreme Court justices) that feel some amount of discomfort in extending the definition to include sexual orientation.¹⁵¹ However, to do nothing would leave LGBTQ employees unprotected from discrimination for an indefinite amount of time until Congress successfully passes a Title VII amendment. Protection against discrimination seems to heavily outweigh concerns regarding reinterpretation of Title VII, especially since this current interpretation resulted from Congress's inability to address the issue at hand sooner.

The past two times that Congress successfully amended Title VII both occurred *after* Title VII was interpreted by the Supreme Court. Congress's Pregnancy Discrimination Act reversed what Congress believed to be an erroneous Supreme Court decision that allowed discrimination against pregnant women, and the 1991 Civil Rights Amendment codified a new causation standard that had already been set forth by the Supreme Court.¹⁵² If the Supreme Court were to interpret "because of sex," in new way contrary to Congressional intent, Congress still has the legislative power to reverse this decision or codify the interpretation thereafter with another Civil Rights Act amendment.

CONCLUSION

For the Supreme Court to rule in favor of Bostock, it would have to broadly interpret the "because of sex" clause in Title VII of the Civil Rights Act. Regardless of the outcome, this would resolve a current circuit court split on whether the prohibition of discrimination based on "sex" extends to discrimination based on an employee's sexual orientation. Further, if the Court rules for Bostock, it will provide necessary protection for LGBTQ workers. There is valid concern that this would be an overextension of the Supreme Court's judicial power; however, a clearer definition of the term "sex" would appropriately protect against sexual orientation discrimination similar to the interpretation of sexual stereotyping in *Price Waterhouse*.

151. *Bostock v. Clayton Cty. Bd. of Comm'rs.*, 723 F. App'x 964, 964–65 (11th Cir. 2018).

152. *Petitioner's Writ of Cert.*, *supra* note 10, at 4 (citing Pregnancy Discrimination Act, 42 U.S.C. § 2000e-2(k) (1978)).