Session 501 | The Meaning of “Sex” and the Evolving Interpretation of “Sex” with Respect to Title VII

Topic: Civil Rights

The meaning of the term “sex” and whether Title VII applies to members of the queer community is a point of contention in the law, specifically whether the discrimination is on the basis of a person’s “sexual orientation” (who they love) or “sexual identity” (the gender by which they identify) constitutes “sex” discrimination. The panel will discuss examples of the conventional application of Title VII as to parity between men and women; Title VII’s application to “gender stereotyping” discrimination, and how it was argued to apply in cases to help protect members of the queer community; recent developments of Title VII’s application including the evolution by the Equal Employment Opportunities Commission (EEOC), first with respect to the transgender community in *Macy v. Holder*, and then the LGBTQ community in *Baldwin v. Foxx*; the Second Circuit decision in *Zarda v. Altitude Express Inc.*, where the Second Circuit held, en banc that sexual orientation and gender identity discrimination are a form of “sex discrimination”; and the circuit split between various jurisdictions in the latest major decisions. Panelists will cover how best to educate clients in the Asian and Asian-American communities with suggestions on how clients can create a welcoming environment for queer employees. The panel will also remind practitioners giving compliance-related advice that it is important to review not only federal law, but also more protective and stronger state and local laws.
Moderator:

Jacob Y. Chen, *Dai & Associates, P.C.*

Speakers:

Concepcion A. Montoya, *Hinshaw & Culbertson LLP*

Derek Ishikawa, *Hirschfeld Kramer LLP*

Michael Hui, *Littler*

**Elimination of Bias or Prejudice, and Ethics**

1. To educate lawyers about the elimination of bias or prejudice in the legal profession, in the practice of law, and/or in the administration of justice; and/or

Section 501, “The Meaning of “Sex” and the Evolving Interpretation of “Sex” with Respect to Title VII of the Civil Rights Act of 1964” educates lawyers on the terminologies important in the discussion of elimination of bias or prejudice in the legal profession, in the practice of law, and/or in the administration of justice. The Zarda panel tracks the legal protections for the LGBTQI+ community presented in the Second Circuit decision in *Zarda v. Altitude Express, Inc.* and two other EEOC opinions in *Macy v. Holder* and *Baldwin v. Foxx*. Speakers will discuss the factual situations in those cases, and how bias or prejudice harms attorneys belonging to the LGBTQI+ community. By understanding the impact company policies have on employees who belong to the LGBTQI+ community, they are able to find ways to create a queer inclusive work environment free from bias or prejudice.

2. To educate lawyers regarding barriers to hiring, retention, promotion, professional development and full participation of lawyers of color, women, and those persons referenced in the "course in the elimination of bias in the legal profession and in the practice of law" both in the public and private sector of the legal profession and in the practice of law.

In addition to studying the legal precedent mentioned above, the speakers of the Zarda panel will educate lawyers on best practices to warn of situational barriers their colleagues in their work spaces face due to bias in the legal profession, and how discrimination impedes creativity and meaningful contribution to the firm. Being knowledgeable and enforcing laws protecting individuals from sex discrimination extending to the LGBTQI+ community will reduce attrition rates and drive organizational or business strategy both in the public and private sector of the legal profession and in the practice of law.
3. Legal ethics must focus on the professional responsibility of attorneys and not on the ethics of business, corporate or government affairs or society in general. For example, activities that educate attorneys on the Rules of Professional Conduct are eligible for MCLE legal ethics credit, but programs that focus on ethical dilemmas encountered in society, a business or a nonlegal profession do not.

American Bar Association's Model Rules of Professional Conduct Rule 1.1 Competence
A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

ABA Model Rule 4.4(a) seeks to regulate lawyer conduct that embarrasses, delays, or burdens a third party. It also prohibits a lawyer from obtaining evidence through means that violate the rights of a third person.

The rules above will be discussed in the context that the attorney must be competent to advise their clients on the current state of the law with Zarda, Baldwin and Macy. In addition, this panel reminds attendees of best practices to provide to their clients (employers) in handling employment matters.
The Meaning of “Sex”

The evolving interpretation of “Sex” with respect to Title VII
Panelists

- Jacob Chen (Moderator): Litigation Partner at Dai & Associates, P.C.
- Concepcion (Connie) A. Montoya: Partner at Hinshaw & Culbertson LLP
- Derek Ishikawa: Attorney at Hirschfeld Kraemer LLP
- Michael J. Hui: Attorney at Littler Mendelson P.C.
Overview

- Title VII of the Civil Rights Act is a federal law that prohibits nationwide discrimination on the basis of race, color, religion, national origin and "sex"

- But what does Title VII mean by “sex”?

- The purpose of this panel is to give an overview of the evolving interpretation of “sex,” from how it was applied historically up to and including how the term is interpreted today across different federal courts
Outline of Content

- “Gender stereotyping” discrimination, and development,
- Evolution in interpretation by the Equal Employment Opportunities Commission (EEOC),
- Deep examination of the Second Circuit decision in *Zarda v Altitude Express, Inc.*, 883 F3d 100 (2d Cir 2018),
- Circuit splits among various jurisdictions, and the Supreme Court granting cert in April 2019,
- Advising clients about avoidance, compliance and creation of inclusive workplaces - especially Asian clients.
The “traditional” understanding of the term “sex,” including specific disclaimer of application to the queer community,

“Gender stereotyping” cases and the understanding that gender stereotyping is a form of sex discrimination,

Application of “gender stereotyping” to discrimination against the queer community

The development of case law surrounding gender stereotyping
Evolution by the EEOC

- Traditional EEOC position on what constitutes sex discrimination
- EEOC’s adoption of “gender stereotyping”
- *Macy v. Holder* and extension of protection to the transgender community
- *Baldwin v. Foxx* and extension of protection to the gay and lesbian community
Zarda v Altitude Express, Inc.

- Factual history in *Zarda v. Altitude Express, Inc.*
- Procedural history, including en banc rehearing
- Decision by the Second Circuit in *Zarda*
- Reasoning by Court why “sex” in Title VII extends to the queer community
- Decision by other Circuit Courts in district by district analysis in the other direction
- Significance of the Supreme Court granting *cert*
Education of Clients

- Understanding terminology
- Gender, Sex, Sexual Identity, Sexual Orientation
- Creating a queer inclusive work environment
- Recognizing the impact of company policies (like “maternity” but not “paternity” leave) on queer families and queer employees
- Educating Asian clients, especially those unfamiliar with the subject matter or coming from very different cultural backgrounds
883 F.3d 100
United States Court of Appeals, Second Circuit.


Docket No. 15-3775
| August Term, 2017
| Argued: September 26, 2017
| Decided: February 26, 2018

Synopsis
Background: Gay former employee brought action against employer alleging, inter alia, gender stereotyping discrimination in violation of Title VII and sexual orientation discrimination in violation of New York law. The United States District Court for the Eastern District of New York, Bianco, J., granted summary judgment in favor of employer with respect to Title VII claim, and jury subsequently found for employer on state law claim. Executors of former employee's estate, who were substituted as plaintiffs when employee died before trial, appealed. The Court of Appeals, 855 F.3d 76, affirmed.

Holdings: On rehearing en banc, the Court of Appeals, Katzmann, Chief Judge, held that:

[1] decision by Court of Appeals on question of whether Title VII applied to sexual orientation discrimination would not constitute advisory opinion;

[2] sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination for purposes of Title VII, overruling Simonton v. Runyon, 232 F.3d 33, and Dawson v. Bumble, 398 F.3d 211; and

[3] employee was entitled to bring Title VII claim for discrimination based on sexual orientation.

Affirmed in part, vacated in part, and remanded.

Dennis Jacobs, Circuit Judge, filed opinion concurring in part.

José A. Cabranes, Circuit Judge, filed opinion concurring in the judgment.

Sack, Circuit Judge, filed opinion concurring in part and in the judgment.

Raymond J. Lohier, Jr., Circuit Judge, filed dissenting opinion in which Livingston, Circuit Judge, joined in part.

Gerard E. Lynch, Circuit Judge, filed dissenting opinion in which Livingston, Circuit Judge, joined in part.

Debra Ann Livingston, Circuit Judge, filed dissenting opinion.

Reena Raggi, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

West Headnotes (37)

[1] Constitutional Law
   ⇔ Advisory Opinions

Federal Courts
   ⇔ Rights and interests at stake; adverseness
Under Article III, a federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them. U.S. Const. art. 3, § 2, cl. 1.

Cases that cite this headnote

[2] Constitutional Law
   ⇔ Labor and employment
Gay former employee alleged sexual orientation discrimination in his Equal Employment Opportunity Commission (EEOC) charge and in his federal court complaint, and, thus, decision by Court of
Appeals on question of whether Title VII applied to sexual orientation discrimination would not constitute advisory opinion; employee's explanation for bringing EEOC complaint, that he was fired because, in addition to being discriminated against because of his sexual orientation, he was also discriminated against because of his gender, gave EEOC adequate notice to investigate discrimination on both bases, and employer argued in its summary judgment motion in District Court that employee's allegations constituted sexual orientation claim under Title VII that was legally invalid. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[3]  Civil Rights
   ➡️ Scope of administrative proceedings; like or related claims
   Claims not raised in an Equal Employment Opportunity Commission (EEOC) complaint may be brought in federal court under Title VII if they are reasonably related to the claim filed with the agency. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[4]  Civil Rights
   ➡️ Scope of administrative proceedings; like or related claims
   A Title VII claim is considered reasonably related to a claim raised in an Equal Employment Opportunity Commission (EEOC) complaint, as required to bring the claim in federal court, if the alleged conduct would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made. Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[5]  Civil Rights
   ➡️ Disparate treatment
   Title VII's broad rule of workplace equality strikes at the entire spectrum of disparate treatment based on protected characteristics, regardless of whether the discrimination is directed against majorities or minorities. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[6]  Civil Rights
   ➡️ Motive or intent; pretext
   The critical inquiry for a court assessing whether an employment practice is because of sex, as would violate Title VII, is whether sex was a motivating factor. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(m).

Cases that cite this headnote

[7]  Civil Rights
   ➡️ Sex Discrimination in General
   Any meaningful regime of antidiscrimination law under Title VII's prohibition against discrimination because of sex must encompass claims based on traits that are a function of sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(m).

Cases that cite this headnote

[8]  Civil Rights
   ➡️ Discrimination by Reason of Sexual Orientation or Identity

Cases that cite this headnote

[9]  Civil Rights
Discrimination by Reason of Sexual Orientation or Identity
Because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, sexual orientation is also protected. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

Civil Rights
Discrimination by Reason of Sexual Orientation or Identity

Cases that cite this headnote

Civil Rights
Motive or intent: pretext
Title VII's prohibition against discrimination because of sex instructs courts to examine employers' motives, not merely their choice of words. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(m).

Cases that cite this headnote

Civil Rights
Discrimination by Reason of Sexual Orientation or Identity

Cases that cite this headnote

Civil Rights
Purpose and construction in general

It falls to the courts to give effect to the broad language that Congress used in prohibiting employment discrimination under Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

Civil Rights
Practices prohibited or required in general; elements
The comparative test for determining whether an employment practice constitutes sex discrimination under Title VII looks at whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different but for that person's sex. (Per Katzmann, Chief Judge, with four judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-2(m).

Cases that cite this headnote

Civil Rights
Disparate treatment
A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was discriminated against with respect to his compensation, terms, conditions, or privileges of employment, and (2) that the employer discriminated because of sex. (Per Katzmann, Chief Judge, with four judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-2(m).

2 Cases that cite this headnote

Civil Rights
Practices prohibited or required in general; elements
To determine whether a trait operates as a proxy for sex using the comparative test for determining whether an employment practice constitutes sex discrimination under Title VII, a court asks whether the employee would have
been treated differently “but for” his or her sex. (Per Katzmann, Chief Judge, with four judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-2(m).

Cases that cite this headnote

[17] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

Under the comparative test for determining whether an employment practice constitutes sex discrimination in violation of Title VII, sexual orientation is a function of sex, and, by extension, sexual orientation discrimination is a subset of sex discrimination. (Per Katzmann, Chief Judge, with four judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

7 Cases that cite this headnote

[18] Civil Rights

Motive or intent; pretext

Employees who experience adverse employment actions as a result of their employer's generalizations about members of their sex, or as a result of their employer's animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender may have a sex discrimination claim under Title VII. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[19] Civil Rights

Practices prohibited or required in general; elements

One way to answer the question of what constitutes a gender-based stereotype, for purposes of sex discrimination under Title VII, is to ask whether the employer who evaluated the plaintiff in sex-based terms would have criticized her as sharply, or criticized her at all, if she had been a man. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[20] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

For the purposes of Title VII's prohibition against sex discrimination, an employer who acts on the basis of a belief that an employee cannot or should not have a particular sexual orientation has acted on the basis of sex. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[21] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

Under Title VII, sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

2 Cases that cite this headnote

[22] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

For purposes of sex discrimination under Title VII, beliefs about sexual orientation necessarily take sex into consideration and, by extension, moral beliefs about sexual orientation are necessarily predicated, in some degree, on sex. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act

Cases that cite this headnote

[23] Civil Rights
   ➔ Discrimination by Reason of Sexual Orientation or Identity
   For purposes of sex orientation discrimination under Title VII, it makes no difference that an employer may not believe that its actions are based in sex. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[24] Civil Rights
   ➔ Motive or intent; pretext
   For purposes of Title VII, any belief that depends, even in part, on sex, is an impermissible basis for employment decisions; this is true irrespective of whether the belief is grounded in fact or lacks a malevolent motive. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-2(m).

Cases that cite this headnote

[25] Civil Rights
   ➔ Practices prohibited or required in general; elements

   Civil Rights
   ➔ Discrimination against men; reverse discrimination
   Under Title VII, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[26] Civil Rights
   ➔ Practices prohibited or required in general; elements

   Civil Rights
   ➔ Discrimination against men; reverse discrimination
   Under Title VII, employers may not discriminate against women or men who fail to conform to conventional gender norms. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[27] Civil Rights
   ➔ Discrimination by Reason of Sexual Orientation or Identity
   Under Title VII, an employer who discriminates against employees based on assumptions about the gender to which the employees can or should be attracted has engaged in sex-discrimination irrespective of whether the employer uses a double-edged sword that cuts both men and women. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[28] Civil Rights
   ➔ Practices prohibited or required in general; elements

   The prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[29] Civil Rights
Civil Rights

Disparate treatment

The only exception to applying the principles announced with respect to one type of discrimination under Title VII to all other types of discrimination is for a bona fide occupational qualification, which permits some differential treatment based on religion, sex, or national origin, but not based on race. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(e).

Cases that cite this headnote

[30] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

Under Title VII, if a male employee married to a man is terminated because his employer disapproves of same-sex marriage, the employee has suffered associational discrimination based on his own sex because the fact that the employee is a man instead of a woman motivated the employer's discrimination against him. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[31] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

Under Title VII, if a male employee married to a man suffers associational discrimination because his employer disapproves of same-sex marriage, it is no defense that the employer requires both men and women to refrain from same-sex attraction or relationships. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[32] Civil Rights

Disparate treatment

Civil Rights

Motive or intent; pretext

Civil Rights

Exemplary or Punitive Damages

Malice is not required by Title VII, rather, it is merely a basis on which an aggrieved employee may seek punitive damages. 42 U.S.C.A. § 1981a(b)(1); Civil Rights Act of 1964, § 701 et seq., 42 U.S.C.A. § 2000e et seq.

Cases that cite this headnote

[33] Civil Rights

Other particular bases of discrimination or classes protected

Associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afoul of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action. Civil Rights Act of 1964 § 703, 42 U.S.C.A. § 2000e-2(a)(1).

Cases that cite this headnote

[34] Civil Rights

Other particular bases of discrimination or classes protected


Cases that cite this headnote

[35] Civil Rights

Discrimination by Reason of Sexual Orientation or Identity

Sexual orientation discrimination, which is based on an employer's opposition to association between particular sexes and thereby discriminates against an employee based on their own sex, constitutes discrimination because of sex under Title VII. Civil Rights Act of 1964 § 703, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-2(m).
The presumptions that statutory terms are used consistently and that differences in terminology denote differences in meaning have the greatest force when the terms are used in the same act.

Gay former employee was entitled to bring Title VII claim against employer for discrimination based on sexual orientation; claim of sexual orientation discrimination was cognizable under Title VII as subset of sex discrimination, employee alleged that he honestly referred to his sexual orientation, that he failed to conform to straight male macho stereotype, and that he was fired, and fact that employee was not successful at trial on related sexual orientation discrimination claim under state law did not preclude him from prevailing on his federal claim, given that state law claim was tried under higher standard of causation than required by Title VII. (Per Katzmann, Chief Judge, with five judges concurring and four judges concurring in the result.) Civil Rights Act of 1964 § 703, 42 U.S.C.A. §§ 2000e-2(a)(1), 2000e-2(m).

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Opinion

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

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

At the time Simonton and Dawson were decided, and for many years since, this view was consistent with the consensus among our sister circuits and the position of the Equal Employment Opportunity Commission (“EEOC” or “Commission”). See, e.g., Kalich v. AT&T Mobility, LLC, 679 F.3d 464, 471 (6th Cir. 2012); Prowel v. Wise Bus. Forms, Inc., 579 F.3d 285, 289 (3d Cir. 2009); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005); Hamer v. St. Vincent Hosp. & Health Care Ctr., Inc., 224 F.3d 701, 704 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 259 (1st Cir. 1999); Wrightson v. Pizza Hut of Am., Inc., 99 F.3d 138, 143 (4th Cir. 1996); Williamson v. A.G. Edwards & Sons, Inc., 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam); see also Johnson v. Frank, EEOC Decision No. 01911827, 1991 WL 1189760, at *3 (Dec. 19, 1991). But legal doctrine evolves and in 2015 the EEOC held, for the first time, that “sexual orientation is inherently a ‘sex-based consideration;’ accordingly an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” Baldwin v. Foxx, EEOC Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015) (quoting *108 Price Waterhouse v. Hopkins, 490 U.S. 228, 242, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion) ). Since then, two circuits have revisited the question of whether claims of sexual orientation discrimination are viable under Title VII. In March 2017, a divided panel of the Eleventh Circuit declined to recognize such a claim, concluding that it was bound by Blum, 597 F.2d at 938, which “ha[s] not been overruled by a clearly contrary opinion of the Supreme Court or of [the Eleventh Circuit] sitting en banc.” Evans v. Ga. Reg’l Hosp., 850 F.3d 1248, 1257 (11th Cir.), cert. denied, ___ U.S. ___, 138 S.Ct. 557, 199 L.Ed.2d 446 (2017). One month later, the Seventh Circuit, sitting en banc, took “a fresh look at [its] position in light of developments at the Supreme Court extending over two decades” and held that “discrimination on the basis of sexual orientation is a form of sex discrimination.” Hively, 853 F.3d at 340–41. In addition, a concurring opinion of this Court recently called “for the Court to revisit” this question, emphasizing the “changing legal landscape that has taken shape in the nearly two decades since Simonton issued,” and identifying multiple arguments that support the conclusion that sexual orientation discrimination is barred by Title VII. Christiansen v. Omnicom Grp., Inc., 852 F.3d 195, 202 (2d Cir. 2017) (Katzmann, C.J., concurring) (“Christiansen and amici advance three arguments, none previously addressed by this Court ....”); see also id. at 204 (“Neither Simonton nor Dawson addressed [the but-for] argument.”).

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

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

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

In the summer of 2010, Donald Zarda, a gay man, worked as a sky-diving instructor at Altitude Express. As part of his job, he regularly participated in tandem skydives, strapped hip-to-hip and shoulder-to-shoulder with clients. In an environment where close physical proximity was common, Zarda’s co-workers routinely referenced sexual orientation or made sexual jokes around clients, and Zarda sometimes told female clients about his sexual orientation to assuage any concern they might have about being strapped to a man for a tandem skydive. That June, Zarda told a female client with whom he was preparing for a tandem skydive that he was gay “and ha[d] an ex-husband to prove it.” J.A. 400 ¶ 23. Although he later said this disclosure was intended simply to preempt any discomfort the client may have felt in being strapped to the body of an unfamiliar man, the client alleged that Zarda inappropriately touched her and disclosed his sexual orientation to excuse his behavior. After the jump was successfully completed, the client told her boyfriend about Zarda’s alleged behavior and reference to his sexual orientation; the boyfriend in turn told Zarda’s boss, who fired shortly Zarda thereafter. *109 Zarda denied inappropriately touching the client and insisted he was fired solely because of his reference to his sexual orientation.

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

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

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

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

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

DISCUSSION

I. Jurisdiction

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

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

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

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

II. Sexual Orientation Discrimination

A. The Scope of Title VII

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

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


[6] In deciding whether Title VII prohibits sexual orientation discrimination, we are guided, as always, by the text and, in particular, by the phrase “because of ... *112 sex.” However, in interpreting this language, we do not write on a blank slate. Instead, we must construe the text in light of the entirety of the statute as well as relevant precedent. As defined by Title VII, an employer has engaged in “impermissible consideration of ... sex ... in employment practices” when “sex ... was a motivating factor for any employment practice,” irrespective of whether the employer was also motivated by “other factors.” 42 U.S.C. § 2000e-2(m). Accordingly, the critical inquiry for a court assessing whether an employment practice is “because of ... sex” is whether sex was “a motivating factor.” Rivera v. Rochester Genesee Reg'l Transp. Auth., 743 F.3d 11, 23 (2d Cir. 2014).

[7] Recognizing that Congress intended to make sex “irrelevant” to employment decisions, Griggs, 401 U.S. at 436, 91 S.Ct. 849, the Supreme Court has held that Title VII prohibits not just discrimination based on sex itself, but also discrimination based on traits that are a function of sex, such as life expectancy, Manhart, 435 U.S. at 711, 98 S.Ct. 1370, and non-conformity with gender norms, Price Waterhouse, 490 U.S. at 250–51, 109 S.Ct. 1775. As this Court has recognized, “any meaningful regime of antidiscrimination law must encompass such claims” because, if an employer is “ [f]ree to add non-sex factors, the rankest sort of discrimination’ ” could be worked against employees by using traits that are associated with sex as a proxy for sex. Back v. Hastings On Hudson Union Free Sch. Dist., 365 F.3d 107, 119 n.9 (2d Cir. 2004) (quoting Phillips v. Martin Marietta Corp., 416 F.2d 1257, 1260 (5th Cir. 1969) (Brown, C.J., dissenting from denial of rehearing en banc) ). Applying Title VII to traits that are a function of sex is consistent with the Supreme Court's view that Title VII covers not just “the principal evil[s] Congress was concerned with when it enacted” the statute in 1964, but also “reasonably comparable evils” that meet the statutory requirements. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).

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

B. Sexual Orientation Discrimination as a Subset of Sex Discrimination

[8] We now conclude that sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination. Looking first to the text of Title VII, the most natural reading of the statute's prohibition on discrimination “because of ... sex” is that it extends to sexual orientation discrimination because sex is necessarily a factor in sexual orientation. This statutory reading is reinforced by considering the question from the perspective of sex stereotyping because sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be, which is an impermissible basis for adverse employment actions. In addition, looking at the question from the perspective of associational discrimination, sexual orientation discrimination—which is motivated by an *113 employer's opposition to romantic association between particular sexes—is discrimination based on the employee's own sex.
I. Sexual Orientation as a Function of Sex

a. “Because of ... sex”

[9] We begin by considering the nature of sexual orientation discrimination. The term “sexual orientation” refers to “[a] person's predisposition or inclination toward sexual activity or behavior with other males or females” and is commonly categorized as “heterosexuality, homosexuality, or bisexuality.” See Sexual Orientation, Black's Law Dictionary (10th ed. 2014). To take one example, “homosexuality” is “characterized by sexual desire for a person of the same sex.” Homosexual, id.; see also Heterosexual, id. (“Of, relating to, or characterized by sexual desire for a person of the opposite sex.”); Bisexual, id. (“Of, relating to, or characterized by sexual desire for both males and females.”). To operationalize this definition and identify the sexual orientation of a particular person, we need to know the sex of the person and that of the people to whom he or she is attracted. Hively, 853 F.3d at 358 (Flaum, J., concurring) (“One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' [sex] ... meaningless.”). Because one cannot fully define a person's sexual orientation without identifying his or her sex, sexual orientation is a function of sex. Indeed sexual orientation is doubly delineated by sex because it is a function of both a person's sex and the sex of those to whom he or she is attracted. Logically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected. See id. (“[D]iscriminating against [an] employee because they are homosexual constitutes discriminating against an employee because of (A) the employee's sex, and (B) their sexual attraction to individuals of the same sex.”). 8

[10] [11] [12] Choosing not to acknowledge the sex-dependent nature of sexual orientation, certain amici contend that employers discriminating on the basis of sexual orientation can do so without reference to sex. 9 In support of this assertion, they point to Price Waterhouse, where the Supreme Court observed that one way to discern the motivation behind an employment decision is to consider whether, “if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be” the applicant or employee's sex. 490 U.S. at 250, 109 S.Ct. 1775. Relying on this language, these amici argue that a “truthful” response to an inquiry about why an employee was fired would be “I fired him because he is gay,” not “I fired him because he is a man.” But this semantic sleight of hand is not a defense; it is a distraction. The employer's failure to reference gender directly does not change the fact that a “gay” employee is simply a man who is attracted to men. *114 For purposes of Title VII, firing a man because he is attracted to men is a decision motivated, at least in part, by sex. More broadly, were this Court to credit amici's argument, employers would be able to rebut a discrimination claim by merely characterizing their action using alternative terminology. Title VII instructs courts to examine employers' motives, not merely their choice of words. See 42 U.S.C. § 2000e-2(m). As a result, firing an employee because he is “gay” is a form of sex discrimination. 10

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

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


As Judge Goldberg, one of the early proponents of hostile work environment claims, explained in a case involving national origin discrimination,

[Title VII’s] language evinces a Congressional intention to define discrimination in the broadest possible terms. Congress chose neither to enumerate specific discriminatory practices, nor to elucidate in extenso the parameter of *115* such nefarious activities. Rather, it pursued the path of wisdom by being unconstrictive, knowing that constant change is the order of our day and that the seemingly reasonable practices of the present can easily become the injustices of the morrow.

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

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

The dissent disagrees with this conclusion. It does not dispute our definition of the word “sex,” Lead Dissent at 145, nor does it argue that this word had a different meaning in 1964. Instead, it charges us with “misconceive[ing] the fundamental public meaning of the language of” Title VII. Id. at 143 (emphasis omitted). According to the dissent, the drafters included “sex” in Title VII to “secure the rights of women to equal protection in employment,” id. at 145, and had no intention of prohibiting sexual orientation discrimination, *id.* at 142–43. We take no position on the substance of the dissent's discussion of the legislative history or the zeitgeist of the 1960s, but we respectfully disagree with its approach to interpreting Title VII as well as its conclusion that sexual orientation discrimination is not a “reasonably comparable evil,” *Oncale*, 523 U.S. at 79, 118 S.Ct. 998, to sexual harassment and male–male harassment. Although legislative history most certainly has its uses, in ascertaining statutory meaning in a Title VII case, *Oncale* specifically rejects reliance on “the principal concerns of our legislators,” *id.* at 79–80, 118 S.Ct. 998—the centerpiece of the dissent's statutory analysis. Rather, *Oncale* instructs that the text is the lodestar of statutory interpretation, emphasizing that we are governed “by the provisions of our laws.” *Id.* The text before us uses broad language, prohibiting discrimination “because of ... sex,” which Congress defined as making sex “a motivating factor.” 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(m). We give these words their full scope and conclude that, because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it.
b. “But for” an Employee’s Sex

[14] Our conclusion is reinforced by the Supreme Court's test for determining whether an employment practice constitutes sex discrimination. This approach, which we call the “comparative test,” determines whether the trait that is the basis for discrimination is a function of sex by asking whether an employee's treatment would have been different “but for that person's sex.” Manhart, 435 U.S. at 711, 98 S.Ct. 1370 (internal quotation marks omitted).

To illustrate its application to sexual orientation, consider the facts of the recent Seventh Circuit case addressing a Title VII claim brought by Kimberly Hively, a lesbian professor who alleged that she was denied a promotion because of her sexual orientation. Hively, 853 F.3d at 341 (majority). Accepting that allegation as true at the motion-to-dismiss stage, the Seventh Circuit compared Hively, a female professor attracted to women (who was denied a promotion), with a hypothetical scenario in which Hively was a male who was attracted to women (and received a promotion). Id. at 345. Under this scenario, the Seventh Circuit concluded that, as alleged, Hively would not have been denied a promotion but for her sex, and therefore sexual orientation is a function of sex. From this conclusion, it follows that sexual orientation discrimination is a subset of sex discrimination. Id.

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

But the real issue raised by the government's critique is the proper application of the comparative test. In the government's view, the appropriate comparison is not between a woman attracted to women and a man attracted to women; it's between a woman and a man, both of whom are attracted to people of the same sex. Determining which of these framings is correct requires understanding the purpose and operation of the comparative test. Although the Supreme Court has not elaborated on the role that

the test plays in Title VII jurisprudence, based on how the Supreme Court has employed the test, we understand that its purpose is to determine when a trait other than sex is, in fact, a proxy for (or a function of) sex. To determine whether a trait is such a proxy, the test compares a female and a male employee who both exhibit the trait at issue. In the comparison, the trait is the control, sex is the independent variable, and employee treatment is the dependent variable.

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

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

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

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

[15] A plaintiff alleging disparate treatment based on sex in violation of Title VII must show two things: (1) that he was “discriminate[d] against ... with respect to his compensation, terms, conditions, or privileges of employment,” and (2) that the employer discriminated “because of ... sex.” 42 U.S.C. § 2000e-2(a)(1). The comparative test addresses the second prong of that test; it reveals whether an employment practice is “because of ... sex” by asking whether the trait at issue (life expectancy, sexual orientation, etc.) is a function of sex. In contrast, courts that have addressed challenges to the sex-specific employment practices identified by the government have readily acknowledged that the policies are based on sex and instead focused their analysis on the first prong: whether the policies impose “disadvantageous terms or conditions of employment.” *119* Harris, 510 U.S. at 25, 114 S.Ct. 367 (Ginsburg, J., concurring); see e.g., Jespersen v. Harrah's Operating Co., 444 F.3d 1104, 1109–10 (9th Cir. 2006) (upholding grooming standards that do not “place[ ] a greater burden on one gender than the other”); Knott v. Mo. Pac. R.R. Co., 527 F.2d 1249, 1252 (8th Cir. 1975) (concluding that “slight differences in the appearance requirements for males and females have only a negligible effect on employment opportunities”); *Willingham v. Macon Tel. Pub'l Co.*, 507 F.2d 1084, 1092 (5th Cir. 1975) (same); *Dodge v. Giant Food, Inc.*, 488 F.2d 1333, 1336–37 (D.C. Cir. 1973) (holding that hair-length regulations, like “the requirement that men and women use separate toilet facilities[,] ... do not pose distinct employment disadvantages for one sex”). Whether sex-specific bathroom and grooming policies impose disadvantageous terms or conditions is a separate question from this Court's inquiry into whether sexual orientation discrimination is “because of ... sex,” and has no bearing on the efficacy of the comparative test.

[16] [17] Having addressed the proper application of the comparative test, we conclude that the law is clear: To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently “but for” his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to women would have been treated differently if she had been a man who was attracted to women. We can therefore
conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.\textsuperscript{17}

2. Gender Stereotyping

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

Since 1978, the Supreme Court has recognized that “employment decisions cannot be predicated on mere ‘stereotyped’ impressions about the characteristics of males or females,” because Title VII “strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” \textit{Manhart}, 435 U.S. at 707 & n.13, 98 S.Ct. 1370. This is true of stereotypes about both how the sexes are and how they should be. \textit{Price Waterhouse}, 490 U.S. at 250, 109 S.Ct. 1775 (“[A]n employer who acts on the basis of a belief that a woman cannot ... or must not [possess certain traits] has acted \textsuperscript{120} on the basis of gender.”); see also Zachary R. Herz, \textit{Note, Price's Progress: Sex Stereotyping and Its Potential for Antidiscrimination Law}, 124 Yale L.J. 396, 405–06 (2014) (distinguishing between ascriptive stereotypes that “treat[ ] a large group of people alike” and prescriptive stereotypes that speak to how members of a group should be).

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

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

\textsuperscript{20} Applying \textit{Price Waterhouse}'s reasoning to sexual orientation, we conclude that when, for example, “an employer ... acts on the basis of a belief that [men] cannot be [attracted to men], or that [they] must not be,” but takes no such action against women who are attracted to men, \textsuperscript{121} the employer “has acted on the basis of gender.” \textit{Cf.} 490 U.S. at 250, 109 S.Ct. 1775.\textsuperscript{20} This conclusion is consistent with \textit{Hively}'s holding that same-sex orientation “represents the ultimate case of failure to conform” to gender stereotypes, 853 F.3d at 346 (majority), and aligns with numerous district courts' observation that “stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. ... The gender stereotype at work here is that ‘real’ men should date women, and not other men,” \textit{Centola v. Potter}, 183 F.Supp.2d 403, 410 (D. Mass. 2002); \textit{see also}, e.g., \textit{Boutillier v. Hartford Pub. Sch.}, 221 F.Supp.3d 255, 269 (D. Conn. 2016); \textit{Videckis v. Pepperdine Univ.}, 150 F.Supp.3d 1151, 1160 (C.D. Cal. 2015); \textit{Terveer v. Billington}, 34 F.Supp.3d 100, 116 (D.D.C. 2014); \textit{Heller v. Columbia Edgewater Country Club}, 195 F.Supp.2d 1212, 1224 (D. Or. 2002).\textsuperscript{21}

\textsuperscript{21} This conclusion is further reinforced by the unworkability of \textit{Simonton} and \textit{Dawson}'s holding that
sexual orientation discrimination is not a product of sex stereotypes. Lower courts operating under this standard have long labored to distinguish between gender stereotypes that support an inference of impermissible sex discrimination and those that are indicative of sexual orientation discrimination. See generally Hively v. Ivy Tech Cnty. Coll., S. Bend, 830 F.3d 698, 705–09 (7th Cir. 2016) (panel op.) (collecting cases), vacated by Hively, 853 F.3d 339 (en banc). Under this approach “a woman might have a Title VII claim if she was harassed or fired for being perceived as too ‘macho’ but not if she was harassed or fired for being perceived as a lesbian.” Fabian v. Hosp. of Cent. Conn., 172 F.Supp.3d 509, 524 n.8 (D. Conn. 2016).

In parsing the evidence, courts have resorted to lexical bean counting, comparing the relative frequency of epithets such as “ass wipe,” “fag,” “gay,” “queer,” “real man,” and “fem” to determine whether discrimination is based on sex or sexual orientation. See, e.g., Kay v. Indep. Blue Cross, 142 Fed.Appx. 48, 51 (3d Cir. 2005). Claims of gender discrimination have been “especially difficult for gay plaintiffs to bring.” Maroney v. Waterbury Hosp., No. 3:10-CV-1415, 2011 WL 1085633, at *2 n.2 (D. Conn. Mar. 18, 2011), because references to a plaintiff’s sexual orientation are generally excluded from the evidence. Boutillier, 221 F.Supp.3d at 269, or permitted only when “the harassment consists of homophobic slurs directed at a heterosexual,” Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist., 169 F.Supp.3d 320, 332–33 (N.D.N.Y. 2016) (emphasis added). But see Franchina, 881 F.3d at 53 (holding that jury may consider evidence referencing plaintiff’s sexual orientation for purposes of a sex discrimination claim). Unsurprisingly, many courts have found these distinctions unworkable, admitting that the doctrine is “illogical,” Philpott v. New York, 252 F.Supp.3d 313, 316 (S.D.N.Y. 2017), and produces “untenable results,” Boutillier, 221 F.Supp.3d at 270. In the face of this pervasive confusion, we are persuaded that “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist save as a lingering and faulty judicial construct.” Videckis, 150 F.Supp.3d at 1159 (quoting Prowel, 579 F.3d at 291). We now conclude that sexual orientation discrimination is rooted in gender stereotypes and is thus a subset of sex discrimination.

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

*124 3. Associational Discrimination*

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

This Court recognized associational discrimination as a violation of Title VII in *Holcomb v. Iona College*, 521 F.3d 130, 139 (2d Cir. 2008), a case involving allegations of racial discrimination. Holcomb, a white man, alleged that he was fired from his job as the assistant coach of a college basketball team because his employer disapproved of his marriage to a black woman. This Court concluded that Holcomb had stated a viable claim, holding that “an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.” *Id.* at 138. Although the Court considered the argument that the alleged discrimination was based on the race of Holcomb's wife rather than his own, it ultimately concluded that “where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's own race.” *Id.* at 139; see also *Whitney v. Greater N.Y. Corp. of Seventh–Day Adventists*, 401 F.Supp. 1363, 1366 (S.D.N.Y. 1975) (“[I]f [plaintiff] was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend.”). 28

Applying similar reasoning, the Fifth, Sixth, and Eleventh Circuits have reached the same conclusion in racial discrimination cases. See *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994–95 (6th Cir. 1999) (holding that plaintiff had alleged discrimination where the employer was “charged with reacting adversely to [plaintiff] because of [his] race in relation to the race of his daughter”); *Deffenbaugh–Williams v. Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (“[A] reasonable juror could find that [plaintiff] was discriminated against because of her race (white), if that discrimination was premised on the fact that she, a white person, had a relationship with a black person.”), vacated in part on other grounds by *Williams v. Wal–Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.”). Other circuits have indicated that associational discrimination extends beyond race to all of Title VII's protected classes. See *Hively*, 853 F.3d at 349 (majority) (holding that Title VII prohibits associational discrimination on the basis of race as well as color, national origin, religion, and sex); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 512 (6th Cir. 2009) (stating, in the context of a race discrimination case, that “Title VII protects individuals *125 who, though not members of a protected class, are victims of discriminatory animus toward protected third persons with whom the individuals associate” (internal quotation marks omitted) (emphasis added) ). 25 We agree and we now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.
This conclusion is consistent with the text of Title VII, which “on its face treats each of the enumerated categories exactly the same” such that “principles ... announce[d]” with respect to sex discrimination “apply with equal force to discrimination based on race, religion, or national origin,” and vice versa. Price Waterhouse, 490 U.S. at 243 n.9, 109 S.Ct. 1775. It also accords with the Supreme Court's application of theories of discrimination developed in Title VII race discrimination cases to claims involving discrimination based on sex. See Meritor, 477 U.S. at 63–67, 106 S.Ct. 2399 (concluding that claims of hostile work environment, a theory of discrimination developed in the context of race, were equally applicable in the context of sex); see also William N. Eskridge, Jr., Title VII’s Statutory History and the Sex Discrimination Argument for LGBT Workplace Protections, 127 Yale L.J. 322, 349 (2017) (explaining that the 1972 amendments to Title VII “repeatedly equated the evils of sex discrimination with those of race discrimination”).

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

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

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

Certain amici supporting the defendants disagree, arguing that applying Holcomb and Loving to same-sex relationships is not warranted because anti-miscegenation policies are motivated by racism, while sexual orientation discrimination is not rooted in sexism. Although these amici offer no empirical support for this contention, amici supporting Zarda cite research suggesting that sexual orientation discrimination has deep misogynistic roots. See, e.g., Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197 (1994). But the Court need not resolve this dispute because the amici supporting defendants identify no cases indicating that the scope of Title VII's protection against sex discrimination is limited to discrimination motivated by what would colloquially be described as sexism. To the contrary, this
approach is squarely foreclosed by the Supreme Court's precedents. In *Oncale*, the Court explicitly rejected the argument that Title VII did not protect male employees from sexual harassment by male co-workers, holding that “Title VII's prohibition on discrimination ‘because of ... sex’ protects men as well as women” and extends to instances where the “plaintiff and the defendant ... are of the same sex.” 523 U.S. at 78–79, 118 S.Ct. 998. This male-on-male harassment is well-outside the bounds of what is traditionally conceptualized as sexism. Similarly, as we have discussed, in *Manhart* the Court invalidated a pension scheme that required female employees to contribute more than their male counterparts because women generally live longer than men. 435 U.S. at 711, 98 S.Ct. 1370. Again, the Court reached this conclusion notwithstanding the fact that some people might not describe this policy as sexist. By extension, even if sexual orientation discrimination does not evince conventional notions of sexism, this is not a legitimate basis for concluding that it does not constitute discrimination “because of ... sex.” 29

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

*128 [33] [34] More fundamentally, *amici’s* argument is an inaccurate characterization of associational discrimination. First, the source of the Title VII claim is not the employee's associational act but rather the employer's discrimination, which is motivated by “disapprov[al] of [a particular type of] association.” See *Holcomb*, 521 F.3d at 139; see also 42 U.S.C. § 2000e-2(m) (asking whether the protected trait was a “motivating factor”). In addition, as it pertains to the employee, what is protected is not the employee's act but rather the employee's protected characteristic, which is a status. *Holcomb*, 521 F.3d at 139; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 2522, 186 L.Ed.2d 503 (2013) (defining “status-based discrimination,” which is “prohibited by Title VII,” as “discrimination on the basis of race, color, religion, sex, or national origin”). Accordingly, associational discrimination is not limited to acts; instead, as with all other violations of Title VII, associational discrimination runs afloat of the statute by making the employee's protected characteristic a motivating factor for an adverse employment action. See 42 U.S.C. § 2000e-2(m). 30

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

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


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

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

Next, certain amici argue that by not enacting legislation expressly prohibiting sexual orientation discrimination in the workplace Congress has implicitly ratified decisions holding that sexual orientation was not covered by Title VII. According to the government's amicus brief, almost every Congress since 1974 has considered \(*130\) such legislation but none of these bills became law.

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

Drawing on the dissent in Hively, the government also argues that Congress considers sexual orientation discrimination to be distinct from sex discrimination because it has expressly prohibited sexual orientation discrimination in certain statutes but not Title VII. See 853 F.3d at 363–64 (Sykes, J., dissenting). While it is true that Congress has sometimes used the terms “sex” and “sexual orientation” separately, this observation is entitled to minimal weight in the context of Title VII.


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

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

III. Summary

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

Title VII’s prohibition on sex discrimination applies to any practice in which sex is a motivating factor. 42 U.S.C. § 2000e-2(m). As explained above, sexual orientation discrimination is a subset of sex discrimination because sexual orientation is defined by one's sex in relation to the sex of those to whom one is attracted, making it impossible for an employer to discriminate on the basis of sexual orientation without taking sex into account. Sexual orientation discrimination is also based on assumptions or stereotypes about how members of a particular gender should be, including to whom they should be attracted. Finally, sexual orientation discrimination is associational discrimination because an adverse employment action that is motivated by the employer's opposition to association between members of particular sexes discriminates against an employee on the basis of sex. Each of these three perspectives is sufficient to support this Court's conclusion and together they amply demonstrate that sexual orientation *132 discrimination is a form of sex discrimination.

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

CONCLUSION

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

Dennis Jacobs, Circuit Judge, concurring:

I concur in Parts I and II.B.3 of the opinion of the Court (Associational Discrimination) and I therefore concur in the result. Mr. Zarda does have a sex discrimination claim under Title VII based on the allegation that he was fired because he was a man who had an intimate relationship with another man. I write separately because, of the several justifications advanced in that opinion, I am persuaded by one; and as to associational discrimination, the opinion of the Court says somewhat more than is necessary to justify it. Since a single justification is sufficient to support the result, I start with associational discrimination, and very briefly explain thereafter why the other grounds leave me unconvinced.

I

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

First: this Circuit has already recognized associational discrimination as a Title VII violation. In Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008), we considered a claim of discrimination under Title VII by a white man who alleged that he was fired because he was a man who had an intimate relationship with another man. We held that “an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race ... The reason is simple: where an employee is subjected to adverse action because an employer
disapproves of interracial association, *133* the employee suffers discrimination because of the employee's own race.” *Id.* at 139 (emphasis in original).

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

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

This line of cases, taken together, demonstrates that discrimination based on same-sex relationships is discrimination cognizable under Title VII notwithstanding that the sexual relationship is homosexual. *Zarda*’s complaint can be fairly read to allege discrimination based on his relationship with a person of the same sex. The allegation is analogous to the claim in *Holcomb*, in which a person of one race was discriminated against on the basis of race because he consorted with a person of a different race. In each instance, the basis for discrimination is disapproval and prejudice as to who is permitted to consort with whom, and the common feature is the sorting: one is the mixing of race and the other is the matching of sex.

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

Mr. Mortara also argues that discrimination based on homosexual acts and relationships is analytically distinct from discrimination against homosexuals, who have a proclivity on which they may or may not act. Academics may seek to know whether discrimination is illegal if based on same-sex attraction itself: they have jurisdiction over interesting questions, and we do not. But the distinction is not decisive. See *Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez*, 561 U.S. 661, 689, 130 S.Ct. 2971, 177 L.Ed.2d 838 (2010) (“Our decisions have declined to distinguish between status and conduct in” the context of sexual orientation.). In any event, the distinction between act and attraction does not arise in this case because Mr. *Zarda*’s termination *134* was sparked by his avowal of a same-sex relationship.

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

II

The opinion of the Court characterizes its definitional analysis as “the most natural reading of Title VII.” Maj. Op. at 112. Not really. “Sex,” which is used in series with “race” and “religion,” is one of the words least likely to fluctuate in meaning. I do not think I am breaking new ground in saying that the word “sex” as a personal characteristic refers to the male and female of the species. Nor can there be doubt that, when Title VII was drafted in 1964, “sex” drew the distinction between men and women. “A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.”
In the opinion of the Court, the word “sex” undergoes modification and expansion. Thus the opinion reasons: “[l]ogically, because sexual orientation is a function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected.” Maj. Op. at 113. It is undeniable that sexual orientation is a “function of sex” in the (unhelpful) sense that it cannot be defined or understood without reference to sex. But surely that is because it has to do with sex—as so many things do. *Everything* that cannot be understood without reference to sex does not amount to sex itself as a term in Title VII. So it seems to me that all of these arguments are circular as well as unnecessary.

III

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

IV

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

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

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

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

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

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

This is a straightforward case of statutory construction. Title VII of the Civil Rights Act of 1964 prohibits discrimination “because of ... sex.” *Id.* Zarda’s sexual orientation is a function of his sex. Discrimination against Zarda because of his sexual orientation therefore is discrimination because of his sex, and is prohibited by Title VII.
That should be the end of the analysis. 1

Sack, Circuit Judge, concurring in the judgment, and in parts I (Jurisdiction), II.A (The Scope of Title VII), II.B.3 (Associational Discrimination), and II.C (Subsequent Legislative Developments) of the opinion for the Court. We decide this appeal in the context of something of a revolution1 in American law respecting gender and sex. It appears to reflect, inter alia, many Americans' evolving regard for and social acceptance of gay and lesbian persons. We are now called upon to address questions dealing directly with sex, sexual behavior, and sexual taboos, a discussion fraught with moral, religious, political, psychological, and other highly charged issues. For those reasons (among others), I think it is in the best interests of us all to tread carefully; to say no more than we must; to decide no more than is necessary to resolve this appeal. This is not for fear of offending, but for fear of the possible consequences of being mistaken in one unnecessary aspect or another of our decision.

In my view, the law of this Circuit governing what is referred to in the majority opinion as “associational discrimination”—discrimination against a person because of his or her association with another—is unsettled. What was embraced by this Court in Simonton v. Runyon, 232 F.3d 33 (2d Cir. 2000) (holding, by implication, that associational discrimination on the basis of sex is not cognizable under Title VII), *136 seems to have both been overtaken by, and to be inconsistent with, our later panel decision in Holcomb v. Iona College, 521 F.3d 130 (2d Cir. 2008) (holding directly that associational discrimination on account of race is unlawful under Title VII). 2 Choosing between the two approaches, as I think we must, I agree with the majority that Holcomb is right and that Simonton is therefore wrong. 3 It is principally on that basis that I concur in the judgment of the Court.

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

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

I agree with the majority opinion that there is no reasonable way to disentangle sex from sexual orientation in interpreting the plain meaning of the words “because of ... sex.” The first term clearly subsumes the second, just as race subsumes ethnicity. 1 Oral Arg. Tr. at 53:5–6 (Government conceding that “ethnicity can be viewed as a subset of race”). From this central holding, the majority opinion explores the comparative approach, the stereotyping rationale, and the associational discrimination rationale to help determine “when a trait other than sex is ... a proxy for (or function of) sex.” Maj. Op. at 116. But in my view, these rationales merely reflect nonexclusive “evidentiary technique[s].” Jacobs, J., Concurring Op. at 134, frameworks, or ways to determine whether sex is a motivating factor in a given case, rather than interpretive tools that apply necessarily across all Title VII cases. Zarda himself has described these three rationales as “evidentiary theories” or “routes.” Oral Arg. Tr. at 4:17–18. On this understanding, I join the majority opinion as to Parts II.A and II.B.1.a, which reflect the textualist's approach, and join the remaining parts of the opinion only insofar as they can be said to apply to Zarda's particular case.

A word about the dissents. My dissenting colleagues focus on what they variously describe as the “ordinary, contemporary, common meaning” of the words “because of ... sex,” Lynch, J., Dissenting Op. at 144 n.8; Livingston, J., Dissenting Op. at 167, or the “public meaning of [those] words adopted by Congress in light of the social problem it was addressing when it chose those words,” Lynch, J., Dissenting Op. at 162. There are at least two problems with this position. First, as the majority opinion points out, cabining the *137 words in this way makes little or no sense of Oncale or, for that matter, Price Waterhouse. See Maj. Op. at 113–14. Second, their hunt for the “contemporary” “public” meaning of the statute in this case seems to me little more than a roundabout search for legislative history. Judge Lynch's laudable call (either as a way to divine congressional intent or as an interpretive check on the plain text approach) to consider what the legislature would have decided if the issue had occurred to the legislators at the time of enactment is, unfortunately, no longer an interpretive option of first resort. Time and time again, the Supreme Court has told us that the cart of legislative history is pulled by the plain text, not the other way around. The text here pulls in one direction, namely, that sex includes sexual orientation.
Gerard E. Lynch, Circuit Judge, with whom Judge Livingston joins as to Parts I, II, and III, dissenting:

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

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

I

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

The Civil Rights Act as a whole was primarily a product of the movement for equality for African–Americans. It grew out of the demands of that movement, and was opposed by segregationist white members of Congress who opposed racial equality. Although the bill, even before it included a prohibition against sex discrimination, went beyond race to prohibit discrimination based on religion and national origin, there is no question that it would not have been under consideration at all but for the national effort to reckon to some degree with America's heritage of race-based slavery and government-enforced segregation.

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

Movement on the bill was slow. It was only after the March on Washington in the summer of 1963, the assassination of President Kennedy in November of that year, and President Johnson's strong support for a civil rights bill that prohibited racial discrimination in employment, that the legislation made progress in Congress. Todd. *138 S. Purdum, An Idea Whose Time Has Come 111–13, 151 (2014). But the private employment discrimination provision, like other sections of the bill prohibiting racial discrimination in public accommodations and federally funded programs, was openly and bitterly opposed by a large contingent of southern members of Congress. See Louis Menand, The Sex Amendment, The New Yorker (July 21, 2014), http://www.newyorker.com/magazine/2014/07/21/sex-amendment. Its passage was by no means assured when the floor debates in the House began.

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

Women's rights groups had been arguing for laws prohibiting sex discrimination since at least World War II, and had been gaining recognition for the agenda of the women's rights movement in other arenas. In addition to supporting (at least rhetorically) civil rights for African–Americans, President Kennedy had taken tentative steps towards support of women's rights as well. In December 1961, he created the President's Commission on the Status of Women, chaired until her
death by Eleanor Roosevelt. Exec. Order No. 10980, 26 Fed. Reg. 12,059 (Dec. 14, 1961). Among *139 other goals, the Commission was charged with developing recommendations for “overcoming discriminations in ... employment on the basis of sex,” and suggesting “services which will enable women to continue their role [ ] as wives and mothers while making a maximum contribution to the world around them.” Id.

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

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

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

Whatever Smith's subjective motivations for proposing it, the amendment was adamantly opposed by many northern liberals on the ground that it would undermine support for the Act as a whole. Purdum, supra, at 197; Menand, supra. Indeed, the *140 New York Times ridiculed the amendment, suggesting that, among other alleged absurdities, it would require Radio City Music Hall to hire male Rockettes, and concluding that “it would have been better if Congress had just abolished sex itself.” Editorial, De-Sexing the Job Market, N.Y. Times, August 21, 1965.

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

Discrimination against gay women and men, by contrast, was not on the table for public debate. In those dark, pre-Stonewall days, same-sex sexual relations were criminalized in nearly all states. Only three years before the passage of Title VII, Illinois, under the influence of the American Law Institute's proposed Model Penal

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

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

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

Given the criminalization of same-sex relationships and arbitrary and abusive police harassment of gay and lesbian citizens, nascent gay rights organizations had more urgent concerns than private employment discrimination. As late as 1968, four years after the passage of Title VII, the North American Conference of Homophile Organizations proposed a “Homosexual Bill of Rights” that demanded five fundamental rights: that private consensual sex between adults not be a crime; that solicitation of sex acts not be prosecuted except on a complaint by someone other than an undercover officer; that sexual orientation not be a factor in granting security clearances, visas, or citizenship; that homosexuality not be a barrier to service in the military; and that sexual orientation not affect eligibility for employment with federal, state, or local governments. Licata, supra, at

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*141* see supra

*142* see supra

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177 (emphasis added). Those proposals, which pointedly did not include a ban on private sector employment discrimination against gays, evidently had little traction with many Americans at the time. The first state to prohibit employment discrimination on the basis of sexual orientation even in the public sector was Pennsylvania, by executive order of the governor, in 1975—more than a decade after the Civil Rights Act had become law. James W. Button et al., The Politics of Gay Rights at the Local and State Level, in The Politics of Gay Rights 269, 272 (Craig A. Rimmerman et al. eds., 2000). It was not until 1982 that Wisconsin became the first state to ban both public and private sector discrimination based on sexual orientation. Id. at 273; see also Linda A. Mooney et al., Understanding Social Problems 467 (6th ed. 2009). Massachusetts followed in 1989. Button et al., supra, at 273. Notably, as discussed more fully below, these states did so by explicit legislative action adding “sexual orientation” to pre-existing anti-discrimination laws that already prohibited discrimination based on sex; they did not purport to “recognize” that sexual orientation discrimination was merely an aspect of already-prohibited discrimination based on sex.

In light of that history, it is perhaps needless to say that there was no discussion of sexual orientation discrimination in the debates on Title VII of the Civil Rights Act. If some sexist legislators considered the inclusion of sex discrimination in the bill something of a joke, or perhaps a poison pill to make civil rights legislation even more controversial, evidently no one thought that adding sexual orientation to the list of forbidden categories was worth using even in that way. Nor did those who opposed the sex provision in Title VII include the possibility that prohibiting sex discrimination would also prevent sexual orientation discrimination in their parade of supposed horribles. When Representative Emanuel Celler of New York, floor manager for the Civil Rights Bill in the House, rose to oppose Representative Smith's proposed amendment, he expressed concern that it would lead to such supposed travesties as the elimination of “protective” employment laws regulating working conditions for women, drafting women for military service, and revisions of rape and alimony laws. See 110 Cong. Rec. 2,577 (1964). He did not reference the prohibition of sexual orientation discrimination. The idea was nowhere on the horizon.

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

A

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

The words used in legislation are used for a reason. Legislation is adopted in response to perceived social problems, and legislators adopt the language that they do to address a social evil or accomplish a desirable goal. The words of the statute take meaning from that purpose, and the principles it adopts must be read in light of the problem it was enacted to address. The words may indeed cut deeper than the legislators who voted for the statute fully understood or intended: as relevant here, a law aimed at producing gender equality in the workplace may require or prohibit employment practices that the legislators who voted for it did not yet understand as obstacles to gender equality. Nevertheless, it remains a law aimed at gender inequality, and not at other forms of discrimination that were understood at the time, and continue to be understood, as a different kind of prejudice, shared not only by some of those who opposed the rights of women and African–Americans, but also by some who believed in equal rights for women and people of color.

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

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

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

The majority cites judicial interpretations of Title VII as prohibiting sexual harassment, and allowing hostile work environment claims, in an effort to argue that the expansion they are making simply follows in this line. Maj. Op. at 114, 115. But the fact that a prohibition on discrimination against members of one sex may have unanticipated consequences when courts are asked to consider carefully whether a given practice does, in fact, discriminate against members of one sex in the workplace does not support extending Title VII by judicial construction to protect an entirely different category of people. It is true that what counts as discrimination against members of one sex may not have been fully fleshed out in the minds of supporters of the legislation, but it is easy enough to illustrate how the language of a provision enacted to accomplish the goal of equal treatment of the
sexes compels results that may not have been specifically intended by its enacters.

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

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

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

The same goes for other forms of “hostile environment” discrimination. The history of resistance to racial integration illustrates why. Employers forced to take down their “whites only” signs could not be permitted to retreat to the position that “you can make me hire black workers, but you can't make me welcome them.” Making black employees so unwelcome that they would be deterred from seeking or retaining jobs previously reserved for whites must be treated as an instance of prohibited racial discrimination—and the same clearly goes for sex discrimination. The Supreme Court recognized that point, in exactly those terms:

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


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

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

None of this, of course, is remotely to suggest that employment discrimination on the basis of sexual orientation is somehow not invidious and wrong. But not everything that is offensive or immoral or economically inefficient is illegal, and if the view that a practice is offensive or immoral or economically inefficient does not command sufficiently broad and deep political support to produce legislation prohibiting it, that practice will remain legal. In the context of private-sector employment, racial discrimination was just as indefensible before 1964 as it is today, but it was not illegal. Discrimination against women, as President Kennedy's commission understood, was just as unfair, and just as harmful to our economy, before Title VII prohibited it as it is now, but if Congress had not adopted Representative Smith's amendment, it would have remained legal. Employment discrimination against older workers, and against qualified individuals with disabilities, imposed unfair burdens on those categories of individuals in 1964, yet it remained legal after the Civil Rights Act of 1964 became law, because Congress did not at that time choose to prohibit such discrimination. Congress is permitted to choose what types of social problems to attack and by which means. The majority says that “we have stated that 'Title VII should be interpreted broadly to achieve equal employment opportunity,' ” Maj. Op. at 111, quoting Huntington Branch, N.A.A.C.P. v. Town of Huntington, 844 F.2d 926, 935 (2d Cir. 1988), but of course that dictum appeared in the context of a discussion of racial discrimination. Congress, in fact, did not legislate in 1964 “broadly to achieve equal employment opportunity” for all Americans, but instead opted to prohibit only certain categories of unfair discrimination. It did not then prohibit, and alas has not since prohibited, discrimination based on sexual orientation.

B

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

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

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

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

And that is indeed the sense in which Title VII uses the word: the statute prohibits such practices as “fail[ing] or refus[ing] to hire or to discharge” persons on account of their race or sex or other protected characteristic, or “otherwise to discriminate against any individual” with respect to employment terms. 42 U.S.C. § 2000e-2(a)(1) (emphasis added). In other words, it is an oversimplification to treat the statute as prohibiting any distinction between men and women in the workplace, still less any distinction that so much as requires the employer to know an employee's sex in order to be applied, cf. Maj. Op. at 112–13; the law prohibits discriminating against members of one sex or the other in the workplace.

That point may have little bite in the context of racial discrimination. The different “races” are defined legally and socially, and not by actual biological or genetic differences—both Hitler's Nuremberg laws and American laws imposing slavery and segregation had to define, arbitrarily, how much ancestry of a particular type consigned persons to a disfavored category, since there is no scientific or genetic basis for distinguishing a “Jew” or a “member of the colored race” from anyone else. And since no biological factor can support any job qualification based on race, courts have taken the view that to distinguish is, for the most part, to discriminate against. But in the area of sex discrimination, where the groups to be treated equally do have potentially relevant biological differences, not every distinction between men and women in the workplace constitutes discrimination against one gender or the other. The *150* distinctions that were prohibited, however, in either case, are those that operate to the disadvantage of (principally) the disfavored race or sex. That is the social problem that the statute aimed to correct.

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

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

Dress codes provide a more complicated example. It is certainly arguable that some forms of separate dress codes further stereotypes harmful to workplace equality for women; requiring female employees to wear “Hooters”-style outfits but male employees doing the same work to wear suit and tie would not stand scrutiny. But what of a pool facility that requires different styles of bathing

suit for male and female lifeguards? Judge Cabranes's concurrence would seem to prohibit that practice, but I believe, and I expect Judge Cabranes would agree, that a pool that required both male and female lifeguards to wear a uniform consisting only of trunks would violate Title VII, while one that prescribed trunks for men and a bathing suit covering the breasts for women would not.

More controversial distinctions, such as different fitness requirements for men and women applying for jobs involving physical strength, have also been upheld. In a recent case, the Fourth Circuit rejected the *151 notion that Title VII prohibits gender-normed physical fitness benchmarks pursuant to which male FBI agent trainees must perform 30 push-ups, while female trainees need only do 14. Bauer v. Lynch, 812 F.3d 340, 342, 351 (4th Cir.), cert. denied, --- U.S. ----, 137 S.Ct. 372, 196 L.Ed.2d 290 (2016). In upholding this distinction, the court noted that of “the few decisions to confront the use of gender-normed physical fitness standards in the Title VII context, none has deemed such standards to be unlawful,” *id.* at 348, because courts have recognized that some physiological differences between men and women “impact their relative abilities to demonstrate the same levels of physical fitness,” *id.* at 351. Thus, the court in Bauer recognized that to distinguish between the sexes is not always to discriminate against one or the other. Indeed, a failure to impose distinct fitness requirements for men and women may be found to violate Title VII, if it has a disparate impact on one sex and the employer cannot justify the requirement as a business necessity. See Lanning v. Se. Pa. Transp. Auth. (SEPTA), 181 F.3d 478, 494 (3d Cir. 1999) (applying Civil Rights Act of 1991 and finding that time cutoff for 1.5 mile run for officers had a disparate impact, when women had a pass rate of only 6.7%, compared to a 55.6% pass rate for men, and remanding to district court to determine whether the score represents “the minimum qualifications necessary for successful performance of the job in question”). Taken to its logical conclusion, though, the majority's interpretation of Title VII would do away with this understanding of the Act.

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

Nor does the example of “discrimination based on traits that are a function of sex, such as life expectancy,” Maj. Op. at 112, help the majority's cause. Discrimination of that sort, as the majority notes, could permit gross discrimination against female employees “by using traits that are associated with sex as a proxy for sex.” *Id.* at 112. That is certainly so as to “traits that are a function of sex,” such as pregnancy or the capacity to become pregnant. But it is not so as to discrimination based on *152 sexual orientation. Same-sex attraction is not “a function of sex” or “associated with sex” in the sense that life expectancy or childbearing capacity are. *18* A refusal to hire gay people cannot serve as a covert means of limiting employment opportunities for men or for women as such; a minority of both men and women are gay, and discriminating against them discriminates against them, as gay people, and does not differentially disadvantage employees or applicants of either sex. *19* That is not the case with other forms of “sex-plus” discrimination that single out for disfavored status traits that are, for example, common to women but rare in men. *20*

C

That “because of ... sex” did not, and still does not, cover sexual orientation, is further supported by the movement, in both Congress and state legislatures, to enact legislation protecting gay men and women against employment discrimination. This movement, which has now been successful in twenty-two states—including all three in our Circuit—and the District of Columbia, has proceeded by expanding the categories of prohibited discrimination in state anti-discrimination laws. *21* In none of those states did the prohibition of sexual orientation discrimination come by judicial interpretation of a pre-existing prohibition on gender-based discrimination to encompass discrimination on
the basis of sexual orientation. Similarly, the Executive Branch has prohibited discrimination against gay men and lesbians in federal employment by adding “sexual orientation” to previously protected grounds. See Exec. Order No. 13087, 63 Fed. Reg 30,097 (May 28, 1998). 22
Finally, the same approach has *153 been reflected in the repeated (but so far unsuccessful) introduction of bills in Congress to add “sexual orientation” to the list of prohibited grounds of employment discrimination in Title VII. 23

The Department of Justice argues, relying on Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc., —— U.S. ———, 135 S.Ct. 2507, 192 L.Ed.2d 514 (2015), that Congress ratified judicial interpretations of “sex” in Title VII as excluding sexual orientation when it amended the Civil Rights Act in 1991 and failed to overrule *154 judicial decisions holding that the sex discrimination provision of Title VII did not cover sexual orientation discrimination. See Brief of United States as Amicus Curiae 8–14. In Inclusive Communities, the Supreme Court held that disparate-impact claims are cognizable under the Fair Housing Act (“FHA”). 135 S.Ct. at 2525. In so holding, the Court found it relevant that Congress had amended the FHA after nine Courts of Appeals had held that the FHA allowed for disparate-impact claims, and did not alter the text of the Act in a way that would make it clear that disparate-impact claims were not contemplated by the FHA. Id. at 2519. Furthermore, the Court found it significant that the legislative history of the FHA amendment made it clear that Congress was aware of those Court of Appeals decisions. Id. at 2519–20. The majority dismisses this argument because at the time of the 1991 amendment to the Civil Rights Act, only three Courts of Appeals 24 had ruled that Title VII did not cover sexual orientation, and Congress did not make clear, in the legislative history of the 1991 amendment, that it was aware of this precedent. Maj. Op. at 127–28.

In light of the clear textual and historical meaning of the sex provision that I have discussed above, I do not find it necessary to rely heavily on the more technical argument that strives to interpret the meaning of statutes by congressional actions and omissions that might be taken as ratifying Court of Appeals decisions. But I do think it is worth noting that the Supreme Court also found it relevant, in Inclusive Communities, that Congress had rejected a proposed amendment “that would have eliminated disparate-impact liability for certain zoning decisions.” 135 S.Ct. at 2520. Here, while only three Courts of Appeals may have ruled on the issue by 1991, over twenty-five amendments had been proposed to add sexual orientation to Title VII between 1964 and 1991. All had been rejected. In fact, two amendments were proposed in 1991, one in the House and one in the Senate, Civil Rights Amendments Act of 1991, S. 574, 102d Congress; Civil Rights Amendments Act of 1991, H.R. 1430, 102d Congress, and neither of those amendments found its way into the omnibus bill that overruled other judicial interpretations of the Civil Rights Act. Moreover, in addition to the three Courts of Appeals that had ruled on the issue, the EEOC—the primary agency charged by Congress with interpreting and enforcing Title VII—had also held, by 1991, that sexual orientation discrimination fell “outside the purview of Title VII.” Dillon v. Frank, EEOC Doc. No. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990).

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

Although the Supreme Court has rightly cautioned against relying on legislative inaction as evidence of congressional intent, because “several equally tenable inferences may be drawn from such inaction, including the inference that the existing *155 legislation already incorporated the offered change,” Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650, 110 S.Ct. 2668, 110 L.Ed.2d 579 (1990) (internal quotation marks omitted), surely the proposal and rejection of over fifty amendments to add sexual orientation to Title VII means something. Supra note 23. And it is pretty clear what it does not mean. It is hardly reasonable, in light of the EEOC and judicial consensus that sex discrimination did not encompass sexual orientation discrimination, to conclude that Congress rejected the proposed amendments because senators and representatives believed that Title VII “already incorporated the offered change.” Pension Benefit Guar. Corp., 496 U.S. at 650, 110 S.Ct. 2668. There
may be many reasons why each proposal ultimately failed, but it cannot reasonably be claimed that the basic reason that Congress did not pass such an amendment year in and year out was anything other than that there was not yet the political will to do so.

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

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

### III

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

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

#### A

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

In unpacking the majority's syllogism, it is first necessary to address what we mean by "sex stereotyping" that "violates Title VII." Invidious stereotyping of members of racial, gender, national, or religious groups is at the heart
of much employment discrimination. Most employers do not entertain, let alone admit to, older forms of racialist or other discriminatory ideologies that hold that members of certain groups are inherently or genetically inferior and undeserving of equal treatment. Much more common are assumptions, not always even conscious, that associate certain negative traits with particular groups. A perception that women, for example, are not suited to executive positions, or are less adept at the mathematical and practical skills demanded of engineers, can be a significant hindrance to women seeking such positions, even when a particular woman is demonstrably qualified, or indeed even where empirical data show that on average women perform as well as or better than men on the relevant tasks. Refusing to hire or promote someone because of that sort of gender (or racial, or ethnic, or religious) stereotyping is not a separate form of sex (or race, or ethnic, or religious) discrimination, but is precisely discrimination in hiring or promotion based on sex (or race, or ethnicity, or religion). It treats applicants or employees not as individuals but as members of a class that is disfavored for purposes of the employment decision by reason of a trait stereotypically assigned to members of that group as a whole. For the most part, then, the kind of stereotyping that leads to discriminatory employment decisions that violate Title VII is the assignment of traits that are negatively associated with job performance (dishonesty, laziness, greed, submissiveness) to members of a particular protected class.

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

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

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

I fully accept the conclusion that that kind of discrimination is prohibited, and that it imposes different conditions of employment on men and on women. Not only does such discrimination require women to behave differently in the workplace than men, but it also actively deters women from engaging in kinds of behavior that are required for advancement to certain positions, and thus effectively bars them from such advancement. The key element here is that one sex is systematically disadvantaged in a particular workplace. In that circumstance, sexual stereotyping is sex discrimination.
But as Judge Sykes points out in her *Hively* dissent, the homophobic employer is not deploying a stereotype about men or about women to the disadvantage of either sex. Such an employer is expressing disapproval of the behavior or identity of a class of people that includes both men and women. 853 F.3d at 370. That disapproval does not stem from a desire to discriminate against either sex, nor does it result from any sex-specific stereotype, nor does it differentially harm either men or women vis-à-vis the other sex. Rather, it results from a distinct type of objection to anyone, of whatever gender, who is identified as homosexual. The belief on which it rests is not a belief about what men or women ought to be or do; it is a belief about what all people ought to be or do—to be heterosexual, and to have sexual attraction to or relations with only members of the opposite sex. That does not make workplace discrimination based on this belief better or worse than other kinds of discrimination, but it does make it something different from sex discrimination, and therefore something that is not prohibited by Title VII.

B

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

It would require absolute blindness to the history of racial discrimination in this country not to understand what is at stake in such cases, and why such allegations unmistakably state a claim of discrimination against an individual employee on the basis of race. Anti-miscegenation laws constituted a bulwark of the structure of institutional racism that is the paradigm of invidious discrimination in this country. African–Americans were condemned first to slavery, and then to second-class citizenship and virtual apartheid, on the basis of an ideology that regarded them as inferior. Such an ideology is incompatible with fraternization, *159* let alone marriage and reproduction, between African–Americans and whites. A prohibition on “race-mixing” was thus grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites.

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

Workplace equality for racial minorities is thus blatantly incompatible with a practice that ostracizes, deems, or inflicts adverse conditions on white employees for marrying, dating, or otherwise associating with, people of color. The prohibition of that kind of discrimination is not simply a matter of noting that, in order to effectuate it, the employer must identify the races of the employee and the person(s) with whom he or she associates. Just as sexual harassment against female employees presents a serious obstacle to the full and equal participation of women in the workplace, discrimination against members of a favored race who so much as associate with persons of another race reflects a deep-seated bigotry against the
Title VII protects individuals who, though not members of a protected class, are victims of discriminatory animus toward protected third persons with whom the individuals associate.

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

Discrimination on the basis of sexual orientation, however, is not discrimination of the sort at issue in Holcomb and Barrett. In those cases, the plaintiffs alleged that they were discriminated against because the employer was biased—that is, had a “discriminatory animus”—against members of the race with whom the plaintiffs associated. There is no allegation in this case, nor could there plausibly be, that the defendant discriminated against Zarda because it had something against men, and therefore discriminated not only against men, but also against anyone, male or female, who associated with them. I have no trouble assuming that the principle of Holcomb and Barrett applies beyond the category of race discrimination: an employer who fired or refused to promote an Anglo–American, Christian employee because she associated with Latinos or Jews would presumably run afoul of that principle just as much as one whose animus ran against black Americans. Such an employer would clearly be discriminating against the employee on the basis of her friends’ ethnicity or religion—in the formulation from the Barrett opinion, that employer would be victimizing an employee out of “discriminatory animus toward protected third persons with whom the [employee] associate[d].” 556 F.3d at 512 (internal quotation marks and alterations omitted).

It is more difficult to imagine realistic hypotheticals in which an employer discriminated against anyone who so much as associated with men or with women, though I suppose academic examples of such behavior could be conjured. But whatever such a case might look like, discrimination against gay people is not it. Discrimination against gay men, for example, plainly is not rooted in animus toward “protected third persons with whom [they] associate.” Id., 556 F.3d at 512. An employer who practices such discrimination is hostile to gay men, not to men in general; the animus runs not, as in the race and religion cases discussed above, against a “protected group” to which the employee's associates belong, but against an (alas) unprotected group to which they belong: other gay men. 50

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

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

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

\textbf{C}

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

The majority asserts that discrimination against gay people is nothing more than a subspecies of discrimination against one or the other gender. Discrimination against gay men and lesbians is wrong, however, because it denies the dignity and equality of gay men and lesbians, and not because, in a purely formal sense, it can be said to treat men differently from women. It is understandable that those who seek to achieve legal protection for gay people victimized by discrimination search for innovative arguments to classify workplace bias against gays as a form of discrimination that is already prohibited by federal law. But the arguments advanced by the majority ignore the evident meaning of the language of Title VII, the social realities that distinguish between the kinds of biases that the statute sought to exclude from the workplace from those it did not, and the distinctive nature of anti-gay prejudice. Accordingly, much as I might wish it were otherwise, I must conclude that those arguments fail.
on the basis of sexual orientation. See supra note 21. But other advances have come by means of Supreme Court decisions interpreting the Constitution. Perhaps the most striking advance, from the vantage of the early 1960s, has been the legalization of same-sex marriage as a matter of constitutional law. 33

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

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

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

First, the entire point of the Constitution is to delimit the powers that have been granted by the people to their government. Our Constitution creates a republican form of government, in which the democratically elected representatives of the majority of the people are granted the power to set policy. But the powers of those representatives are constrained by a written text, which prevents a popular majority—both in the federal Congress and, since the Civil War Amendments, in state legislatures—from violating certain fundamental rights. As every law student reads in his or her first-year constitutional law class, “[t]he powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the constitution is written.” Marbury v. Madison, 1 Cranch 137, 176, 2 L.Ed. 60 (1803). To the extent that the courts exercise a non-democratic or counter-majoritarian power, they do so in the name of those rights. See City of Richmond v. J.A. Croson Co., 488 U.S. 469, 495, 109 S.Ct. 706, 102 L.Ed.2d 854 (1989) (quoting United States v. Carolene Products, 304 U.S. 144, 153 n.4, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) to explain that “one aspect of the judiciary's role under the Equal Protection Clause is to protect ‘discrete and insular minorities’ from majoritarian prejudice or indifference”). Particular exercises of that power, including the gay rights decisions of this new millennium, may be controversial, *164 and fierce disagreements exist over the legitimacy of various methods of constitutional interpretation. And it is not controversial that the power to assess the constitutionality of legislation must be exercised with restraint, and with a due deference to the judgments of elected officials who themselves have taken an oath to defend the Constitution. But it has long been generally accepted that the courts have a special role to play in defending the liberties enshrined in the Constitution against encroachment even by the people's elected representatives. See City of Boerne v. Flores, 521 U.S. 507, 536, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997) (explaining that “Congress' discretion [to enact legislation] is not unlimited, however, and the courts retain the power, as they have since Marbury v. Madison, to determine if Congress has exceeded its authority under the Constitution”).

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

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

Legislation, in contrast, can and often does set policy in minute detail. It does not necessarily concern itself with deep general principles. Rather, legislators are entitled to pick and choose which problems to address, and how far to go in addressing them. Within the limits of constitutional guarantees, Congress is given “wide latitude” to legislate, City of Boerne, 521 U.S. at 520, 117 S.Ct. 2157, but courts must struggle to define those limits by giving coherent meaning to broad constitutional principles. The majestic guarantee of equal protection in the Fourteenth Amendment is a very different kind of pronouncement than the prohibition, in Title VII, of specific kinds of discrimination, by a specified subset of employers, based on clearly defined categories. The language of the Constitution thus allows a broader scope for interpretation.

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

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

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

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

The question of how the government, acting at the behest of a possibly temporary political majority, is permitted to treat the people it governs, is a different question, and is answered by reference to different principles, than the question of what obligations should be imposed on private citizens. The former question must ultimately be answered by courts under the principles adopted in the Constitution. The latter is entrusted primarily to the legislative process. Courts interpreting statutes are not in the business of imposing on private actors new rules that have not been embodied in legislative decision. It is for that reason that segregation in public facilities was struck down by constitutional command, long before segregation of private facilities was prohibited by federal legislation adopted by Congress. Whether or not the Fifth and Fourteenth Amendments have something to tell us how a government must behave when it regulates the people it governs, is a different question, than with very limited exceptions, to govern the government.

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

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

For these reasons, I respectfully, and regretfully, dissent.

Debra Ann Livingston, Circuit Judge, dissenter: I dissent for substantially the reasons set forth in Sections I, II, and III of Judge Lynch’s opinion, and I join in those sections. I share in the commitment that all individuals in the workplace be treated fairly, and that individuals not be subject to workplace discrimination on the basis of their sexual orientation, just as on the basis of their “race, color, religion, sex, [and] national origin.” I cannot conclude, however, as the majority does, that sexual orientation discrimination is a “subset” of sex discrimination, Maj. Op. at 112–13, 114 n.10, 119, 119–20, et passim, and is therefore included among the prohibited grounds of workplace discrimination listed in Title VII.
The majority's efforts founder on the simple question of how a reasonable reader, competent in the language and its use, would have understood Title VII's text when it was written—on the question of its public meaning at the time of enactment. The majority acknowledges the argument “that it is not ‘even remotely plausible that in 1964, when Title VII was adopted, a reasonable person competent in the English language would have understood that a law banning employment discrimination ‘because of sex’ also banned discrimination because of sexual orientation.’ ”  Id. at 114 (citation omitted). It does not contest the point, however, but seeks merely to justify its departure from ordinary, contemporary meaning by claiming that “[e]ven if that [is] so,” its approach no more departs from the ordinary meaning of words in their contemporary context than supposedly occurred when sexual harassment and hostile work environment claims were first recognized by courts.  Id. at 114–15. But as Judge Lynch has cogently explained, that is simply not the case. Dissenting Op. at 144–47. The majority does not discover a “plain” yet hidden meaning in Title VII, sufficiently obscure as to wholly elude every appellate court, including this one, until the Seventh Circuit's decision in  Hively v. Ivy Tech Cnty. Coll. of Ind., 853 F.3d 339 (7th Cir. 2017) (en banc), last year. Instead, it sub silentio abandons our usual approach to statutory interpretation. See, e.g.,  Sandifer v. U.S. Steel Corp., —— U.S. ———, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014) (noting the ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning’) (quoting  Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979) );  Bilski v. Kappos, 561 U.S. 593, 603, 130 S.Ct. 3218, 177 L.Ed.2d 792 (2010) (quoting  Perrin and applying the same canon of statutory interpretation);  Diamond v. Diehr, 450 U.S. 175, 182, 101 S.Ct. 1048, 67 L.Ed.2d 155 (1981) (same).

Because Sections I, II, and III of Judge Lynch's dissent are sufficient to answer the statutory question that this case presents,  *168 I do not go further to address the subject of constitutional interpretation, and do not join in Section IV. I agree with Judge Lynch, however, that constitutional and statutory interpretation should not be confused: that while courts sometimes may be called upon to play a special role in defending constitutional liberties against encroachment by government, in statutory interpretation, courts “are not in the business of imposing on private actors new rules that have not been embodied in legislative decision.” Dissenting Op. at 166. To do so chips away at the democratic and rule-of-law principles on which our system of governance is founded—the very principles we rely on to secure the legitimacy and the efficacy of our laws, including antidiscrimination legislation. 2

The Supreme Court said unanimously, just last Term, that the proper role of the judiciary in statutory interpretation is “to apply, not amend, the work of the People's representatives,” even when reasonable people might believe that “Congress should reenter the field and alter the judgments it made in the past.”  Henson v. Santander Consumer USA Inc., —— U.S. ———, 137 S.Ct. 1718, 1725–26, 198 L.Ed.2d 177 (2017). “[I]t is for Congress, not the courts, to write the law,”  Stanard v. Olesen, 74 S.Ct. 768, 771, 98 L.Ed. 1151 (1954), and where ‘Congress’ ... decisions are mistaken as a matter of policy, it is for Congress to change them. We should not legislate for them[.]”  Herb's Welding, Inc. v. Gray, 470 U.S. 414, 427, 105 S.Ct. 1421, 84 L.Ed.2d 406 (1985) (citing  Victory Carriers, Inc v. Law, 404 U.S. 202, 216, 92 S.Ct. 418, 30 L.Ed.2d 383 (1971)).

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

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

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

All Citations

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

18 One amicus and the lead dissent interpret dicta in Price Waterhouse as establishing that sex stereotyping is discriminatory only when it pertains to traits that are required for the employee's job. See 490 U.S. at 251, 109 S.Ct. 1775 (observing that "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not"). We think this narrow reading is an inaccurate statement of Price Waterhouse, which did not indicate that stereotyping is impermissible only when the stereotyped trait is required for the plaintiff's job, and it is directly contradicted by Manhart holding that discriminating against women based on their longer life expectancy, which was certainly not an employment requirement, violated Title VII. 435 U.S. at 710–11, 98 S.Ct. 1370.

19 In this respect, discerning whether a stereotype is based on sex is closely aligned with the comparative test articulated in Manhart, which can illustrate both (1) whether a trait is a function of sex and (2) whether assumptions about that trait reflect a gender stereotype.
Some amici insist that stereotypes are mere evidence of discrimination and that stereotyping does not, by itself, constitute sex discrimination. Beyond establishing an adverse employment action, a Title VII plaintiff must always adduce evidence that an employer discriminated “because of” a protected trait and the Court agrees that sex stereotyping is legally relevant as “evidence that gender played a part” in a particular employment decision. Price Waterhouse, 490 U.S. at 251, 109 S.Ct. 1775 (emphasis omitted). But, Price Waterhouse's reference to the evidentiary value of stereotyping in no way undercuts it conclusion that an employer may not “evaluate employees by assuming or insisting that they match[ ] the stereotype associated with their group.” Id. And, just as the Supreme Court concluded that “an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender,” id. at 250, 109 S.Ct. 1775, this Court concludes that an employer who acts on the basis of a belief that an employee cannot or should not have a particular sexual orientation has acted on the basis of sex.

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

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

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

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


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

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

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

29 To the extent that amici are arguing that racism and sexism are necessary elements of a Title VII claim because these beliefs are invidious or malicious, we think their contentions are misguided. Malice, which the Supreme Court has described as an “evil motive,” is not required by Title VII, Kolstad v. Am. Dental Ass’n, 527 U.S. 565, 573, 119 S. Ct. 2118, 144 L.Ed.2d 494 (1999); to the contrary, it is merely a basis on which an aggrieved employee may seek punitive damages, see 42 U.S.C. § 1981a(b)(1).

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

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

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

33 We also note that there has been a sea change in the constitutional framework governing same-sex marriage. See generally Obergefell v. Hodges, — U.S. ——, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015); United States v. Windsor, 570 U.S. 744, 133 S.Ct. 2675, 186 L.Ed.2d 808 (2013). In the wake of this transformation, the intersection of the modern constitutional framework and decades-old precedents regarding sexual orientation discrimination under Title VII created a “paradoxical legal landscape” in which a man could exercise his constitutional right to marry his same-sex partner on Saturday and “then be fired on Monday for just that act.” Hively, 830 F.3d at 714 (majority). This decision frees this circuit’s jurisprudence regarding sexual orientation from that paradox.
The old anti-slavery school say [sic] women must stand back and wait until the negroes shall be recognized. But we say, if you will not give the whole loaf of suffrage to the entire people, give it to the most intelligent first. If intelligence, justice, and morality are to have precedence in the Government, let the question of woman be brought up first and that of the negro last.

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

Pauli Murray and Mary O. Eastwood, lawyers and women’s rights activists, exemplified that recognition, writing:

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


In fact, many civil rights and women’s rights organizations were reluctant to support gay rights. See, e.g., Bhaskar A. Shukla, Feminism: From Mary Wollstonecraft to Betty Friedan 111 (2007) (describing how Betty Friedan had opposed “equating feminism with lesbianism,” and is said to have coined the anti-lesbian phrase “Lavender Menace” during a 1969 National Organization for Women meeting). Similarly, some civil rights leaders were uncomfortable with according public prominence to Bayard Rustin, a gay black man, despite his formidable organizing skills. Rustin was a leading strategist of the civil rights movement, and was the chief organizer of the 1963 March on Washington. John D’Emilio, Lost Prophet: The Life and Times of Bayard Rustin 2–3 (2003). Although Rustin spent most of his life fighting for civil rights for African–Americans, “[p]rejudice of another sort, still not named as such in mid century America, had curtailed his opportunities and limited his effectiveness.” Id. at 326–27 (2003).

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

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

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

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

As the Supreme Court has repeatedly instructed, “[i]t is a ‘fundamental canon of statutory construction’ that, ‘unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning.’” *Sandifer v. U.S. Steel Corp.*, — U.S. ——, 134 S.Ct. 870, 876, 187 L.Ed.2d 729 (2014), quoting Perrin v. United States, 444 U.S. 37, 42, 100 S.Ct. 311, 62 L.Ed.2d 199 (1979). It is worth noting, moreover, that, because legislation is a fundamentally political process, the *political* context of legislation, and the way in which language is (or is *not*) used in the public debate over proposed legislation, can be useful in understanding that meaning.

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

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

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

The text of the sex provision, as well as the principle of equal treatment of both sexes makes it as obvious that the less-frequently encountered situation of sexual harassment of male employees, whether by men or by women, must also be included in Title VII’s prohibitions. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983) (noting that under Title VII, “[m]ale as well as female employees are protected against discrimination”); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998) (holding that “nothing in Title VII necessarily bars a claim of discrimination ‘because of ... sex’ merely because the plaintiff and the defendant ... are of the same sex”).
Indeed, Judge Cabranes's concurring opinion suggests that that interpretation is so obvious and straightforward that nothing more need be said on the subject, and that we can dispense with the various arguments from precedent and principle that the majority opinion makes in support of its holding. Cabranes, J., Concurring Op. at 135. But that interpretation, in fact, is anything but obvious.

The majority's reliance on a footnote in Price Waterhouse does nothing to change this fact. Maj. Op. at 123–24. The majority quotes the portion of the footnote stating that Title VII "on its face treats each of the enumerated categories exactly the same," and that the "principles ... announce[d]" by the Price Waterhouse Court with regard to gender "apply with equal force to discrimination based on race, religion, or national origin," to support its conclusion that the associational discrimination cases that have arisen in the context of race should also apply to associational discrimination in terms of gender. Price Waterhouse v. Hopkins, 490 U.S. 228, 243 n.9, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989). While I explain my disagreement with this argument below, it is worth noting here why this footnote does not change the above analysis. The Court in Price Waterhouse did not state that every decision with regard to one enumerated group in Title VII must be applied blindly to every other group. Rather, it emphasized that the "principles" embedded in Title VII should apply with equal force to each enumerated category. Id. It is those principles that have allowed courts to interpret the various prohibitions in Title VII "against the background of ... the historical context from which the Act arose," United Steelworkers of Am., AFL–CIO–CLC v. Weber, 443 U.S. 193, 201, 99 S.Ct. 2721, 61 L.Ed.2d 480 (1979), in upholding distinctions between sexes that would unquestionably be rejected if made between races. And it is the principle of equal opportunity animating Title VII that I have attempted to distill in this opinion.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The majority notes the same “paradox.” Maj. Op. at 131 n.33.

For the record, I note that I fully agree with the majority’s discussion of our jurisdiction, Maj. Op. at 109–11.

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

Notably, all three states in this Circuit have prohibited workplace discrimination on the basis of sexual orientation, as have nineteen other states and the District of Columbia, all through legislation, and not judicial reinterpretation of existing prohibitions on sex discrimination. Under New York law, Zarda was thus able to present his claim that he was subject to workplace discrimination on the basis of his sexual orientation to a jury. The jury decided in favor of his former employer, Altitude Express.
On December 9, 2011, Complainant filed an appeal concerning her equal employment opportunity (EEO) complaint alleging employment discrimination in violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. § 2000e et seq. For the following reasons, the Commission finds that the Complainant’s complaint of discrimination based on gender identity, change of sex, and/or transgender status is cognizable under Title VII and remands the complaint to the Agency for further processing.

BACKGROUND

Complainant, a transgender woman, was a police detective in Phoenix, Arizona. In December 2010 she decided to relocate to San Francisco for family reasons. According to her formal complaint, Complainant was still known as a male at that time, having not yet made the transition to being a female.

Complainant’s supervisor in Phoenix told her that the Bureau of Alcohol, Tobacco, Firearms and Explosives (Agency) had a position open at its Walnut Creek crime laboratory for which the Complainant was qualified. Complainant is trained and certified as a National Integrated Ballistic Information Network (NIBIN) operator and a BrassTrax ballistics investigator.

Complainant discussed the position with the Director of the Walnut Creek lab by telephone, in either December 2010 or January 2011, while still presenting as a man. According to Complainant, the telephone conversation covered her experience, credentials, salary and

\[1\] The facts in this section are taken from the EEO Counselor’s Report and the formal complaint of discrimination. Because this decision addresses a jurisdictional issue, we offer no position on the facts themselves and thus no position on whether unlawful discrimination occurred in this case.
benefits. Complainant further asserts that, following the conversation, the Director told her she would be able to have the position assuming no problems arose during her background check. The Director also told her that the position would be filled as a civilian contractor through an outside company.

Complainant states that she talked again with the Director in January 2011 and asked that he check on the status of the position. According to Complainant in her formal complaint, the Director did so and reasserted that the job was hers pending completion of the background check. Complainant asserts, as evidence of her impending hire, that Aspen of DC ("Aspen"), the contractor responsible for filling the position, contacted her to begin the necessary paperwork and that an investigator from the Agency was assigned to do her background check.  

On March 29, 2011, Complainant informed Aspen via email that she was in the process of transitioning from male to female and she requested that Aspen inform the Director of the Walnut Creek lab of this change. According to Complainant, on April 3, 2011, Aspen informed Complainant that the Agency had been informed of her change in name and gender. Five days later, on April 8, 2011, Complainant received an email from the contractor's Director of Operations stating that, due to federal budget reductions, the position at Walnut Creek was no longer available.

According to Complainant, she was concerned about this quick change in events and on May 10, 2011, she contacted an agency EEO counselor to discuss her concerns. She states that the counselor told her that the position at Walnut Creek had not been cut but, rather, that someone

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2 It appears from the record that Aspen of DC may be considered a staffing firm. Under the Commission's Enforcement Guidance: Application of EEO Laws to Contingent Workers Placed by Temporary Employment Agencies and Other Staffing Firms, EEOC Notice No. 915.002 (December 3, 1997), we have recognized that a “joint employment” relationship may exist where both the Agency and the “staffing firm” may be deemed employers. The Commission makes no determination at this time as to whether or not a “joint employment” relationship exists in this case as this issue is not presently before us.

3 On March 28, 2011, Complainant received an e-mail from the contractor asking her to fill out an application packet for the position. It is unclear how far the background investigation had proceeded prior to Complainant notifying the contractor of her gender change, but e-mails included in the record indicate that the Agency’s Personnel Security Branch had received Complainant’s completed security package, that Complainant had been interviewed by a security investigator, and that the investigator had contacted Complainant on March 31, 2011 and had indicated that he “hope[d] to finish your investigation the first of next week.”

4 In the narrative accompanying her formal complaint, Complainant asserts she contacted the Agency’s EEO Counselor on May 5, 2011. However, the EEO Counselor’s report indicates that the initial contact occurred on May 10, 2011.
else had been hired for the position. Complainant further states that the counselor told her that the Agency had decided to take the other individual because that person was farthest along in the background investigation. Complainant claims that this was a pretextual explanation because the background investigation had been proceeding on her as well. Complainant believes she was incorrectly informed that the position had been cut because the Agency did not want to hire her because she is transgender.

The EEO counselor’s report indicates that Complainant alleged that she had been discriminated against based on sex, and had specifically described her claim of discrimination as “change in gender (from male to female).”

On June 13, 2011, Complainant filed her formal EEO complaint with the Agency. On her formal complaint form, Complainant checked off “sex” and the box “female,” and then typed in “gender identity” and “sex stereotyping” as the basis of her complaint. In the narrative accompanying her complaint, Complainant stated that she was discriminated against on the basis of “my sex, gender identity (transgender woman) and on the basis of sex stereotyping.”

On October 26, 2011, the Agency issued Complainant a Letter of Acceptance, stating that the “claim alleged and being accepted and referred for investigation is the following: Whether you were discriminated against based on your gender identity sex (female) stereotyping when on May 5, 2011, you learned that you were not hired as a Contractor for the position of [NIBIN] Ballistics Forensic Technician in the Walnut Creek Lab, San Francisco Field Office.” The letter went on to state, however, that “since claims of discrimination on the basis of gender identity stereotyping cannot be adjudicated before the [EEOC], your claims will be processed according to Department of Justice policy.” The letter provided that if Complainant did not agree with how the Agency had identified her claim, she should contact the EEO office within 15 days.

The Department of Justice has one system for adjudicating claims of sex discrimination under Title VII and a separate system for adjudicating complaints of sexual orientation and gender identity discrimination by its employees. This separate process does not include the same rights offered under Title VII and the EEOC regulations set forth under 29 C.F.R. Part 1614. See Department of Justice Order 1200.1, Chapter 4-1, B.7.j, found at http://www.justice.gov/jmd/ps/chpt4-1.html (last accessed on March 30, 2012). While such complaints are processed utilizing the same EEO complaint process and time frames – including an ADR program, an EEO investigation and issuance of a final Agency decision – the Department of Justice process allows for fewer remedies and does not include the right to request a hearing before an EEOC Administrative Judge or the right to appeal the final Agency decision to the Commission.

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5 The Counselor’s Report includes several email exchanges with various Agency officials who informed the counselor of the circumstances by which it was decided not to hire Complainant.
On November 8, 2011, Complainant’s attorney contacted the Agency by letter to explain that the claims that Complainant had set forth in the formal complaint had not been correctly identified by the Agency. The letter explained that the claim as identified by the Agency was both incomplete and confusing. The letter noted that “[Complainant] is a transgender woman who was discriminated against during the hiring process for a job with [the Agency],” and that the discrimination against Complainant was based on “separate and related” factors, including on the basis of sex, sex stereotyping, sex due to gender transition/change of sex, and sex due to gender identity. Thus, Complainant disagreed with the Agency’s contention that her claim in its entirety could not be adjudicated through the Title VII and EEOC process simply because of how she had stated the alleged bases of discrimination.

On November 18, 2011, the Agency issued a correction to its Letter of Acceptance in response to Complainant’s November 8, 2011 letter. In this letter, the Agency stated that it was accepting the complaint “on the basis of sex (female) and gender identity stereotyping.” However, the Agency again stated that it would process only her claim “based on sex (female)” under Title VII and the EEOC’s Part 1614 regulations. Her claim based on “gender identity stereotyping” would be processed instead under the Agency’s “policy and practice,” including the issuance of a final Agency decision from the Agency’s Complaint Adjudication Office.

**CONTENTIONS ON APPEAL**

On December 6, 2011, Complainant, through counsel, submitted a Notice of Appeal to the Commission asking that it adjudicate the claim that she was discriminated against on the basis of “sex stereotyping, sex discrimination based gender transition/change of sex, and sex discrimination based gender identity” when she was denied the position as an NIBIN ballistics technician.

Complainant argues that EEOC has jurisdiction over her entire claim. She further asserts that the Agency’s “reclassification” of her claim of discrimination into two separate claims of discrimination – one “based on sex (female) under Title VII” which the Agency will investigate under Title VII and the EEOC’s Part 1614 regulations, and a separate claim of discrimination based on “gender identity stereotyping” which the Agency will investigate under a separate process designated for such claims -- is a “de facto dismissal” of her Title VII claim of discrimination based on gender identity and transgender status.

In response to Complainant’s appeal, the Agency sent a letter to the Commission on January 11, 2012, arguing that Complainant’s appeal was “premature” because the Agency had accepted a claim designated as discrimination “based on sex (female).”

In response to the Agency’s January 11, 2012 letter, Complainant wrote to the Agency on February 8, 2012, stating that, in light of how the Agency was characterizing her claim, she wished to withdraw her claim of “discrimination based on sex (female),” as characterized by the Agency, and to pursue solely the Agency’s dismissal of her complaint of discrimination.
based on her gender identity, change of sex and/or transgender status. In a letter to the
Commission dated February 9, 2012, Complainant explained that she had withdrawn the claim
"based on sex (female)" as the Agency had characterized it, in order to remove any possible
procedural claim that her appeal to the Commission was premature.

Complainant reiterates her contention that the Agency mischaracterized her claim and asks the
Commission to rule on her appeal that the Agency should investigate, under Title VII and the
EEOC’s Part 1514 regulations, her claim of discriminatory failure to hire based on her gender
identity, change of sex, and/or transgender status.

ANALYSIS AND FINDINGS

The narrative accompanying Complainant’s complaint makes clear that she believes she was
not hired for the position as a result of making her transgender status known. As already noted,
Complainant stated that she was discriminated against on the basis of "my sex, gender identity
(transgender woman) and on the basis of sex stereotyping." In response to her complaint, the
Agency stated that claims of gender identity discrimination "cannot be adjudicated before the
[EEOC]." See Agency Letters of October 26, 2011 and November 18, 2011. Although it is
possible that the Agency would have fully addressed her claims under that portion of her
complaint accepted under the 1614 process, the Agency’s communications prompted in
Complainant a reasonable belief that the Agency viewed the gender identity discrimination she
alleged as outside the scope of Title VII’s sex discrimination prohibitions. Based on these
communications, Complainant believed that her complaint would not be investigated effectively
by the Agency, and she filed the instant appeal.

EEOC Regulation 29 C.F.R. §1614.107(b) provides that where an agency decides that some,
but not all, of the claims in a complaint should be dismissed, it must notify the complainant of
its determination. However, this determination is not appealable until final action is taken on
the remainder of the complaint. In apparent recognition of the operation of §1614.107(b),
Complainant withdrew the accepted portion of her complaint from the 1614 process so that the
constructive dismissal of her gender identity discrimination claim would be a final decision and
the matter ripe for appeal.

In the interest of resolving the confusion regarding a recurring legal issue that is demonstrated
by this complaint’s procedural history, as well as to ensure efficient use of resources, we
accept this appeal for adjudication. Moreover, EEOC’s responsibilities under Executive Order
12067 for enforcing all Federal EEO laws and leading the Federal government’s efforts to
eradicate workplace discrimination, require, among other things, that EEOC ensure that
uniform standards be implemented defining the nature of employment discrimination under the
statutes we enforce. Executive Order 12067, 43 F.R. 28967, § 1-301(a) (June 30, 1978). To
that end, the Commission hereby clarifies that claims of discrimination based on transgender

status, also referred to as claims of discrimination based on gender identity, are cognizable under Title VII’s sex discrimination prohibition, and may therefore be processed under Part 1614 of EEOC’s federal sector EEO complaints process.

We find that the Agency mistakenly separated Complainant’s complaint into separate claims: one described as discrimination based on “sex” (which the Agency accepted for processing under Title VII) and others that were alternatively described by Complainant as “sex stereotyping,” “gender transition/change of sex,” and “gender identity” (Complainant Letter of Nov. 8, 2011); by the Agency as “gender identity stereotyping” (Agency Letter Nov. 18, 2011); and finally by Complainant as “gender identity, change of sex and/or transgender status” (Complainant Letter Feb. 8, 2012). While Complainant could have chosen to avail herself of the Agency’s administrative procedures for discrimination based on gender identity, she clearly expressed her desire to have her claims investigated through the 1614 process, and this desire should have been honored. Each of the formulations of Complainant’s claims are simply different ways of stating the same claim of discrimination “based on . . . sex,” a claim cognizable under Title VII.

Title VII states that, except as otherwise specifically provided, “[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex . . . .” 42 U.S.C. § 2000e-16(a) (emphasis added). Cf. 42 U.S.C. §§ 2000e-2(a)(1), (2) (it is unlawful for a covered employer to “fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment,” or to “limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s . . . sex”) (emphasis added).

As used in Title VII, the term “sex” “encompasses both sex—that is, the biological differences between men and women—and gender.” See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) (“The Supreme Court made clear in the context of Title VII, discrimination because of ‘sex’ includes gender discrimination.”). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred “not just discrimination because of biological sex, but also gender stereotyping—failing to act and appear according to expectations defined by gender.” As such, the terms “gender” and “sex” are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins, 490 U.S. 228, 239 (1989) (emphasis added) (“Congress’ intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.”).

That Title VII’s prohibition on sex discrimination proscribes gender discrimination, and not just discrimination on the basis of biological sex, is important. If Title VII proscribed only discrimination on the basis of biological sex, the only prohibited gender-based disparate treatment would be when an employer prefers a man over a woman, or vice versa. But the
statute's protections sweep far broader than that, in part because the term "gender" encompasses not only a person's biological sex but also the cultural and social aspects associated with masculinity and femininity.

In *Price Waterhouse*, the employer refused to make a female senior manager, Hopkins, a partner at least in part because she did not act as some of the partners thought a woman should. Id. at 230-31, 235. She was informed, for example, that to improve her chances for partnership she should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." Id. at 235. The Court concluded that discrimination for failing to conform with gender-based expectations violates Title VII, holding that "[i]n the specific context of sex stereotyping, an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250.

Although the partners at *Price Waterhouse* discriminated against Ms. Hopkins for failing to conform to stereotypical gender norms, gender discrimination occurs any time an employer treats an employee differently for failing to conform to any gender-based expectations or norms. "What matters, for purposes of . . . the *Price Waterhouse* analysis, is that in the mind of the perpetrator the discrimination is related to the sex of the victim." *Schwenk*, 204 F.3d at 1201-02; see also *Price Waterhouse*, 490 U.S. at 254-55 (noting the illegitimacy of allowing "sex-linked evaluations to play a part in the [employer's] decision-making process").

"Title VII does identify one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a 'bona fide occupational qualification [ (BFOQ) ] reasonably necessary to the normal operation of th[e] particular business or enterprise.'" *Price Waterhouse*, 490 U.S. at 242 (quoting 42 U.S.C. § 2000e-2(e)). Even then, "the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex." *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (Marshall, J., concurring). "The only plausible inference to draw from this provision is that, in all other circumstances, a person's gender may not be considered in making decisions that affect her." *Price Waterhouse*, 490 U.S. at 242.

When an employer discriminates against someone because the person is transgender, the employer has engaged in disparate treatment "related to the sex of the victim." *See Schwenk*, 204 F.3d at 1202. This is true regardless of whether an employer discriminates against an employee because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not

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6 There are other, limited instances in which gender may be taken into account, such as in the context of a valid affirmative action plan, see *Johnson v. Santa Clara County Transportation Agency*, 480 U.S. 616 (1987), or relatedly, as part of a settlement of a pattern or practice claim.
like that the person is identifying as a transgender person. In each of these circumstances, the employer is making a gender-based evaluation, thus violating the Supreme Court’s admonition that “an employer may not take gender into account in making an employment decision.” Price Waterhouse, 490 U.S. at 244.

Since Price Waterhouse, courts have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination “on the basis of sex” in many scenarios involving individuals who act or appear in gender-nonconforming ways.7 And since Price Waterhouse, courts also have widely recognized the availability of the sex stereotyping theory as a valid method of establishing discrimination “on the basis of sex” in scenarios involving transgender individuals.

For example, in Schwenk v. Hartford, a prison guard had sexually assaulted a pre-operative male-to-female transgender prisoner, and the prisoner sued, alleging that the guard had

7 See, e.g., Lewis v. Heartland Inns of Am., L.L.C., 591 F.3d 1033, 1041 (8th Cir. 2010) (concluding that evidence that a female “tomboyish” plaintiff had been fired for not having the “Midwestern girl look” suggested “her employer found her unsuited for her job . . . because her appearance did not comport with its preferred feminine stereotype”); Prowel v. Wise Business Forms, Inc., 579 F.3d 285 (3rd Cir. 2009) (an effeminate gay man who did not conform to his employer’s vision of how a man should look, speak, and act provided sufficient evidence of gender stereotyping harassment under Title VII); Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (involving a heterosexual female who alleged that her lesbian supervisor discriminated against her on the basis of sex, and finding that “a plaintiff may satisfy her evidentiary burden under Title VII by showing that the harasser was acting to punish the plaintiff’s noncompliance with gender stereotypes”); Nichols v. Azteca Rest. Enters., 256 F.3d 864, 874-75 (9th Cir. 2001) (concluding that a male plaintiff stated a Title VII claim when he was discriminated against “for walking and carrying his tray ‘like a woman’ – i.e., for having feminine mannerisms”); Simonjon v. Runyon, 332 F.3d 33, 37 (2d Cir. 2000) (indicating that a gay man would have a viable Title VII claim if “the abuse he suffered was discrimination based on sexual stereotypes, which may be cognizable as discrimination based on sex”); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 n.4 (1st Cir. 1999) (analyzing a gay plaintiff’s claim that his co-workers harassed him by “mocking his supposedly effeminate characteristics” and acknowledging that “just as a woman can ground an action on a claim that men discriminated against her because she did not meet stereotyped expectations of femininity . . . a man can ground a claim on evidence that other men discriminated against him because he did not meet stereotypical expectations of masculinity”); Doe by Doe v. City of Belleville, 119 F.3d 563, 580-81 (7th Cir. 1997) (involving a heterosexual male who was harassed by other heterosexual males, and concluding that “a man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he . . . does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex”), vacated and remanded on other grounds, 523 U.S. 1001 (1998).
violated the Gender Motivated Violence Act (GMVA), 42 U.S.C. § 13981. 204 F.3d at 1201-02. The U.S. Court of Appeals for the Ninth Circuit found that the guard had known that the prisoner "considered herself a transsexual and that she planned to seek sex reassignment surgery in the future." Id. at 1202. According to the court, the guard had targeted the transgender prisoner "only after he discovered that she considered herself female[,]" and the guard was "motivated, at least in part, by [her] gender"—that is, "by her assumption of a feminine rather than a typically masculine appearance or demeanor." Id. On these facts, the Ninth Circuit readily concluded that the guard's attack constituted discrimination because of gender within the meaning of both the GMVA and Title VII.

The court relied on Price Waterhouse, reasoning that it stood for the proposition that discrimination based on sex includes discrimination based on a failure "to conform to socially-constructed gender expectations." Id., at 1201-02. Accordingly, the Ninth Circuit concluded, discrimination against transgender females—i.e., "as anatomical males whose outward behavior and inward identity [do] not meet social definitions of masculinity"—is actionable discrimination "because of sex." Id. (emphasis added); cf. Rosa v. Park W. Bank & Trust Co., 214 F.3d 213, 215-16 (1st Cir. 2000) (finding that under Price Waterhouse, a bank's refusal to give a loan application to a biologically-male plaintiff dressed in "traditionally feminine attire" because his "attire did not accord with his male gender" stated a claim of illegal sex discrimination in violation of the Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f).

Similarly, in Smith v. City of Salem, the plaintiff was "biologically and by birth male." 378 F.3d at 568. However, Smith was diagnosed with Gender Identity Disorder (GID), and began to present at work as a female (in accordance with medical protocols for treatment of GID). Id. Smith's co-workers began commenting that her appearance and mannerisms were "not masculine enough." Id. Smith's employer later subjected her to numerous psychological evaluations, and ultimately suspended her. Id. at 569-70. Smith filed suit under Title VII alleging that her employer had discriminated against her because of sex, "both because of [her] gender non-conforming conduct and, more generally, because of [her] identification as a transsexual." Id. at 571 (emphasis added).

The district court rejected Smith's efforts to prove her case using a sex-stereotyping theory, concluding that it was really an attempt to challenge discrimination based on "transsexuality." Id. The U.S. Court of Appeals for the Sixth Circuit reversed, stating that the district court's conclusion:

cannot be reconciled with Price Waterhouse, which does not make Title VII protection against sex stereotyping conditional or provide any reason to exclude Title VII coverage for non sex-stereotypical behavior simply because the person is a transsexual. As such, discrimination against a plaintiff who is a transsexual—and therefore fails to act and/or identify with his or her gender—is no different from the discrimination directed against [the plaintiff] in Price Waterhouse who, in sex-stereotypical terms, did not act like a woman. Sex
stereotyping based on a person’s gender non-conforming behavior is impermissible discrimination, irrespective of the cause of that behavior; a label, such as “transsexual” is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity. Accordingly, we hold that Smith has stated a claim for relief pursuant to Title VII’s prohibition of sex discrimination.

Id. at 574–75. 8

Finally, as the Eleventh Circuit suggested in Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011), consideration of gender stereotypes will inherently be part of what drives discrimination against a transgndered individual. In that case, the employer testified at his deposition that it had fired Vandiver Elizabeth Glenn, a transgender woman, because he considered it “inappropriate” for her to appear at work dressed as a woman and that he found it “unsettling” and “unnatural” that she would appear wearing women’s clothing. Id. at 1320. The firing supervisor further testified that his decision to dismiss Glenn was based on his perception of Glenn as “a man dressed as a woman and made up as a woman,” and admitted that his decision to fire her was based on “the sheer fact of the transition.” Id. at 1320–21. According to the Eleventh Circuit, this testimony “provides ample direct evidence” to support the conclusion that the employer acted on the basis of the plaintiff’s gender non-conformity and therefore granted summary judgment to her. Id. at 1321.

In setting forth its legal reasoning, the Eleventh Circuit explained:

A person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes. “[T]he very acts that define transgender people as transgender are those that contradict stereotypes of gender-appropriate appearance and behavior.” Ilona M. Turner, Sex Stereotyping Per Se: Transgender Employees and Title VII, 95 Cal. L. Rev. 561, 563 (2007); see also Taylor Flynn, Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality, 101 Colum. L.Rev. 392, 392 (2001) (defining transgender persons as those whose “appearance, behavior, or other personal characteristics differ from traditional gender norms”). There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms.

8 See also Barnes v. City of Cincinnati, 401 F.3d 729, 741 (6th Cir. 2005) (affirming a jury award in favor of a pre-operative transgender female, ruling that “a claim for sex discrimination under Title VII ... can properly lie where the claim is based on 'sexual stereotypes'” and that the “district court therefore did not err when it instructed the jury that it could find discrimination based on ‘sexual stereotypes’”).
Accordingly, discrimination against a transgender individual because of her
gender-nonconformity is sex discrimination, whether it’s described as being on
the basis of sex or gender.

Glenn v. Brumby, 663 F.3d 1312, 1316-17 (11th Cir. 2011).  

There has likewise been a steady stream of district court decisions recognizing that
discrimination against transgender individuals on the basis of sex stereotyping constitutes
discrimination because of sex. Most notably, in Schroer v. Billington, the Library of Congress
rescinded an offer of employment it had extended to a transgender job applicant after the
applicant informed the Library's hiring officials that she intended to undergo a gender
of Columbia entered judgment in favor of the plaintiff on her Title VII sex discrimination
claim. According to the district court, it did not matter “for purposes of Title VII liability
whether the Library withdrew its offer of employment because it perceived Schroer to be an
insufficiently masculine man, an insufficiently feminine woman, or an inherently gender-
nonconforming transsexual.” Id. at 305. In any case, Schroer was “entitled to judgment based
on a Price-Waterhouse-type claim for sex stereotyping . . . .” Id.  

To be sure, the members of Congress that enacted Title VII in 1964 and amended it in 1972
were likely not considering the problems of discrimination that were faced by transgender
individuals. But as the Supreme Court recognized in Oncale v. Sundowner Offshore Services,
Inc.:  

But see Eitsitty v. Utah Trans. Auth., No. 2:04-CV-616, 2005 WL 1505610, at *4-5 (D.
Utah June 24, 2005) (concluding that Price Waterhouse is inapplicable to transsexuals), aff’d
on other grounds, 502 F.3d 1215 (10th Cir.2007).

The district court in Schroer also concluded that discrimination against a transgender
individual on the basis of an intended, ongoing, or completed gender transition is “literally
discrimination ‘because of . . . sex.’” Schroer, 577 F. Supp. 2d at 308; see also id. at 306-07
(analogizing to cases involving discrimination based on an employee’s religious conversion,
which undeniably constitutes discrimination “because of . . . religion” under Title VII). For
other district court cases using sex stereotyping as grounds for establishing coverage of
transgender individuals under Title VII, see Michaels v. Akal Security, Inc., No. 09-cv-1300,
Group, Inc., 542 F. Supp. 2d 653, 660 (S.D. Tex. 2008); Mitchell v. Axcap Scandipharm,
HealthNet Lakeshore Hosp., No. 03-CV-0375E(SC), 2003 WL 22757935 (W.D.N.Y. Sept 26,
2003); Doe v. United Consumer Fin. Servs., No. 1:01 CV 111, 2001 WL 34350174 (N.D.
Ohio Nov. 9, 2001).
Statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed. Title VII prohibits "discrimination . . . because of . . . sex" in . . . employment. [This] . . . must extend to [sex-based discrimination] of any kind that meets the statutory requirements.

523 U.S. at 79-80; see also Newport News, 462 U.S. at 679-81 (rejecting the argument that discrimination against men does not violate Title VII despite the fact that discrimination against women was plainly the principal problem that Title VII's prohibition of sex discrimination was enacted to combat).

Although most courts have found protection for transgender people under Title VII under a theory of gender stereotyping, evidence of gender stereotyping is simply one means of proving sex discrimination. Title VII prohibits discrimination based on sex whether motivated by hostility, by a desire to protect people of a certain gender, by assumptions that disadvantage men, by gender stereotypes, or by the desire to accommodate other people's prejudices or discomfort. While evidence that an employer has acted based on stereotypes about how men or women should act is certainly one means of demonstrating disparate treatment based on sex, "sex stereotyping" is not itself an independent cause of action. As the Price Waterhouse Court

11 See Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (recognizing that sexual harassment is actionable discrimination "because of sex"); Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("A trier of fact might reasonably find such discrimination, for example, if a female victim is harassed in such sex-specific and derogatory terms by another woman as to make it clear that the harasser is motivated by general hostility to the presence of women in the workplace.").

12 See Int'l Union v. Johnson Controls, 499 U.S. 187, 191 (1991) (policy barring all female employees except those who were infertile from working in jobs that exposed them to lead was facially discriminatory on the basis of sex).

13 See, e.g., Newport News, 462 U.S. at 679-81 (providing different insurance coverage to male and female employees violates Title VII even though women are treated better).

14 See, e.g., Price Waterhouse, 490 U.S. at 250-52.

15 See, e.g., Chaney v. Plainfield Healthcare Ctr., 612 F.3d 908, 912 (7th Cir. 2010) (concluding that "assignment sheet that unambiguously, and daily, reminded [the plaintiff, a black nurse,] and her co-workers that certain residents preferred no black" nurses created a hostile work environment); Fernandez v. Wynn Oil Co., 653 F.2d 1273, 1276-77 (9th Cir. 1981) (a female employee could not lawfully be fired because her employer's foreign clients would only work with males); Diaz v. Pan American World Airways, Inc., 442 F.2d 385, 389 (5th Cir. 1971) (rejecting customer preference for female flight attendants as justification for discrimination against male applicants).
noted, while “stereotyped remarks can certainly be evidence that gender played a part” in an adverse employment action, the central question is always whether the “employer actually relied on [the employee’s] gender in making its decision.” Id. at 251 (emphasis in original).

Thus, a transgender person who has experienced discrimination based on his or her gender identity may establish a prima facie case of sex discrimination through any number of different formulations. These different formulations are not, however, different claims of discrimination that can be separated out and investigated within different systems. Rather, they are simply different ways of describing sex discrimination.

For example, Complainant could establish a case of sex discrimination under a theory of gender stereotyping by showing that she did not get the job as an NIBIN ballistics technician at Walnut Creek because the employer believed that biological men should consistently present as men and wear male clothing.

Alternatively, if Complainant can prove that the reason that she did not get the job at Walnut Creek is that the Director was willing to hire her when he thought she was a man, but was not willing to hire her once he found out that she was now a woman—she will have proven that the Director discriminated on the basis of sex. Under this theory, there would actually be no need, for purposes of establishing coverage under Title VII, for Complainant to compile any evidence that the Director was engaging in gender stereotyping.

In this respect, gender is no different from religion. Assume that an employee considers herself Christian and identifies as such. But assume that an employer finds out that the employee’s parents are Muslim, believes that the employee should therefore be Muslim, and terminates the employee on that basis. No one would doubt that such an employer discriminated on the basis of religion. There would be no need for the employee who experienced the adverse employment action to demonstrate that the employer acted on the basis of some religious stereotype—although, clearly, discomfort with the choice made by the employee with regard to religion would presumably be at the root of the employer’s actions. But for purposes of establishing a prima facie case that Title VII has been violated, the employee simply must demonstrate that the employer impermissibly used religion in making its employment decision.

The District Court in Schroer provided reasoning along similar lines:

Imagine that an employee is fired because she converts from Christianity to Judaism. Imagine too that her employer testifies that he harbors no bias toward either Christians or Jews but only ‘converts.’ That would be a clear case of discrimination ‘because of religion.’ No court would take seriously the notion that ‘converts’ are not covered by the statute. Discrimination “because of religion” easily encompasses discrimination because of a change of religion.

577 F. Supp. 2d at 306.
Applying Title VII in this manner does not create a new “class” of people covered under Title VII—for example, the “class” of people who have converted from Islam to Christianity or from Christianity to Judaism. Rather, it would simply be the result of applying the plain language of a statute prohibiting discrimination on the basis of religion to practical situations in which such characteristics are unlawfully taken into account. See Brumby, 663 F.3d at 1318-19 (noting that “all persons, whether transgender or not” are protected from discrimination and “[a]n individual cannot be punished because of his or her perceived gender non-conformity”).

Thus, we conclude that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on . . . sex,” and such discrimination therefore violates Title VII. 16

CONCLUSION

Accordingly, the Agency's final decision declining to process Complainant’s entire complaint within the Part 1614 EEO complaints process is REVERSED. The complaint is hereby REMANDED to the Agency for further processing in accordance with this decision and the Order below.

ORDER (E0610)

The Agency is ordered to process the remanded complaint in accordance with 29 C.F.R. § 1614.108 et seq. The Agency shall acknowledge to the Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The Agency shall issue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within one hundred fifty (150) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision within sixty (60) days of receipt of Complainant’s request. A copy of the Agency’s letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

16 The Commission previously took this position in an amicus brief docketed with the district court in the Western District of Texas on Oct. 17, 2011, where it explained that “[i]t is the position of the EEOC that disparate treatment of an employee because he or she is transgender is discrimination “because of . . . sex” under Title VII.” EEOC Amicus Brief in Pacheco v. Freedom Buick GMC Truck, No. 07-116 (W.D. Tex. Oct. 17, 2011), Dkt. No. 30, at page 1, 2011 WL 5410751. With this decision, we expressly overturn, in light of the recent developments in the caselaw described above, any contrary earlier decisions from the Commission. See, e.g., Jennifer Casoni v. United States Postal Service, EEOC DOC 01840104 (Sept. 28, 1984); Campbell v. Dep't of Agriculture, EEOC Appeal No. 01931703 (July 21, 1994); Kowalczyk v. Dep't of Veterans Affairs, EEOC Appeal No. 01942053 (March 14, 1996).
IMPLEMENTATION OF THE COMMISSION'S DECISION (K0610)

Compliance with the Commission’s corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency’s report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission’s order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission’s order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.

STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party’s timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (Nov. 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.
Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

**COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)**

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. **Filing a civil action will terminate the administrative processing of your complaint.**

**RIGHT TO REQUEST COUNSEL (Z0610)**

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).

**FOR THE COMMISSION:**

Bernadette B. Wilson  
Acting Executive Officer  
Executive Secretariat

*April 20, 2012*

Date
Complainant timely filed an appeal with the Equal Employment Opportunity Commission (EEOC or Commission) from the Agency’s final decision, dated July 17, 2013, dismissing his complaint of unlawful employment discrimination alleging a violation of Title VII of the Civil Rights Act of 1964 (Title VII), as amended, 42 U.S.C. §§ 2000e–2000e-17. For the reasons that follow, the Commission REVERSES and REMANDS the Agency’s final decision.

ISSUES PRESENTED

The issues presented in this case are (1) whether Complainant’s initial contact with an Equal Employment Opportunity (EEO) Counselor was timely; and (2) whether a complaint alleging discrimination based on sexual orientation in violation of Title VII of the Civil Rights Act of 1964 lies within the Commission’s jurisdiction.¹

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as a Supervisory Air Traffic Control Specialist at the Agency’s Southern Region, Air Traffic Division, Air Traffic Control Tower/International Airport in Miami, Florida.

¹ This decision addresses only the timeliness and jurisdiction questions raised on appeal. We take no position on the merits of Complainant’s claim of discrimination. That is for the Agency to determine upon remand.
On August 28, 2012, Complainant contacted an EEO Counselor and on December 21, 2012, filed a formal EEO complaint alleging that the Agency subjected him to discrimination on the bases of sex (male, sexual orientation) and reprisal for prior protected EEO activity when, on July 26, 2012, he learned that he was not selected for a permanent position as a Front Line Manager (FLM) at the Miami Tower TRACON facility (the Miami facility).

The Agency accepted the complaint for investigation. When the investigation was completed, Complainant was given his notice of right to request a hearing before an EEOC Administrative Judge or an immediate final decision by the Agency based on the investigative report. On May 21, 2013, Complainant requested an immediate final decision from the Agency. The Agency issued its Final Agency Decision (FAD) on July 12, 2013.

The evidence developed during the investigation shows that in October 2010, Complainant was selected for and accepted a temporary FLM position at the Miami facility. The record further reflects that the Agency issued a vacancy announcement for a permanent FLM position in June 2012.

Complainant did not officially apply for the permanent position based on his understanding that all temporary FLMs, such as himself, were automatically considered for any open permanent FLM posting. Complainant claimed that management knew of his desire to obtain a permanent FLM position and that he was well-qualified for the position given his years of experience, as well as his familiarity with the Miami facility. Complainant was not selected for the permanent FLM position. The failure to be selected for the permanent FLM position forms the basis of his discrimination complaint.

The Agency asserts that the permanent FLM position was never filled, and hence no discrimination occurred.

Complainant alleged that he was not selected because he is gay. He alleged that his supervisor, who was involved in the selection process for the permanent position, made several negative comments about Complainant’s sexual orientation. For example, Complainant stated that in May 2011, when he mentioned that he and his partner had attended Mardi Gras in New Orleans, the supervisor said, “We don’t need to hear about that gay stuff.” He also alleged that the supervisor told him on a number of occasions that he was “a distraction in the radar room” when his participation in conversations included mention of his male partner.

In its FAD, the Agency did not address the merits of Complainant’s claim. Instead, the Agency dismissed the complaint on the grounds that it had not been raised in a timely fashion with an EEO Counselor, as required by EEOC regulations. The Agency reasoned that the 45-day limitation period in which Complainant should have contacted an EEO Counselor started to run in October 2010, the date on which the Complainant was aware that his temporary FLM position would expire after two years and he would be returned to his previous position. Therefore, the Agency found, Complainant’s EEO Counselor contact in August 2012 was made well beyond the 45-day limitation period.
The FAD also notified Complainant that, pursuant to the “Secretary’s Policy on Sexual Orientation” and the “Departmental Office of Civil Rights’ March 7, 1998 Procedures for Complaints of Discrimination based on Sexual Orientation,” the “sexual orientation portion of the claim is appealable to [the Agency] and the portion of the claim involving reprisal is appealable to the EEOC [pursuant to 29 C.F.R. § 1614.110(b)].”

Complainant appealed the Agency’s decision to the Commission.

ANALYSIS AND FINDINGS

Timeliness of EEO Counselor Contact

EEOC’s regulations require that complaints of discrimination be brought to the attention of an Equal Employment Opportunity Counselor “within 45 days of the date of the matter alleged to be discriminatory or, in the case of personnel action, within 45 days of the effective date of the action.” 29 C.F.R. § 1614.105(a)(1). The Commission has long applied a “reasonable suspicion” standard, viewed from the perspective of the complainant, to determine when the 45-day limitation period is triggered. See, e.g., Complainant v. U.S. Postal Serv., EEOC Appeal No. 0120093169, 2014 WL 2999934 (EEOC June 27, 2014) (citing Howard v. Dep’t of the Navy, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999), citing Ball v. U.S. Postal Serv., EEOC Appeal No. 01871261, 1988 WL 921053 (EEOC July 6, 1988), req. for recon. den., EEOC Request No. 05980247 (July 15, 1988)). Thus, the time limitation is not triggered until a complainant should reasonably suspect discrimination, even if all the facts that might support the charge of discrimination have not yet become apparent.

Further, it is well-settled that when, as here, there is an issue of timeliness, “[a]n agency always bears the burden of obtaining sufficient information to support a reasoned determination as to timeliness.” Williams v. Dep’t of Def., EEOC Request No. 05920506, 1992 WL 1374923, *3 (EEOC Aug. 25, 1992). We conclude the Agency has not met this burden and erred in dismissing the complaint for untimely EEO counseling.

In its FAD, the Agency stated that it considered the date of the alleged adverse action to be October 2010, when Complainant assumed his temporary FLM position and, according to the Agency, knew that he would be returned to his former position at the expiration of the appointment. However, the Agency acknowledged in its FAD that “the date of the incident for the instant complaint is in dispute.” It is clear that a permanent FLM vacancy was posted in June 2012 and a selection was made in July 2012, although the selectee later declined the position and the certificate of eligibles expired without any further selection being made. The Agency argued that Complainant did not apply for the position, but Complainant claims that

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2 Complainant did not submit an application for the vacant permanent FLM position. Whether, under the facts of this case, Complainant was or was not required to submit an application in order to be
he did not formally apply because of his understanding that all temporary FLMs were automatically considered for vacant, permanent FLM positions. Further, Complainant stated that his desire for promotion was well known in the Miami facility.

According to the affidavits of Complainant’s first-level supervisor (S1) and second-level supervisor (S2), individuals, including Complainant, competed for the temporary FLM appointments. In February 2012, an announcement was made that a temporary FLM (Employee 1) had been converted to permanent status. Employee 1 did not compete for the permanent position. Subsequently, a second temporary FLM (Employee 2) was converted to permanent status without competing for the position. Neither S1 nor S2 explained the process by which temporary FLMs were converted to permanent status, although S2 stated that it was a matter of managerial discretion.

It is not reasonable for the Agency to argue that Complainant knew or should have known that he was being discriminated against with regard to conversion to a permanent position at the time he was appointed to a temporary FLM position. Complainant had no reason to know or to suspect at the time of his temporary appointment that he subsequently would not be selected for a permanent FLM position, let alone for discriminatory reasons. As the elevation of the two temporary FLMs demonstrates, conversion to a permanent FLM position was a realistic possibility for Complainant if a vacancy arose during his tenure. The Agency’s position might have merit if Complainant’s claim were that, when he was given a temporary appointment, other individuals outside of his protected group were given permanent appointments. But that is not the claim at bar. Rather, the claim is whether Complainant was treated disparately when he was not converted to permanent status nearly two years after his appointment.

The standard we apply to determine timeliness is when Complainant reasonably should have first suspected discrimination. Here, we find that Complainant could only reasonably have suspected that discrimination occurred after he learned he was not selected for conversion to the permanent FLM position on July 26, 2012, near the end of his two-year temporary assignment. See Howard, EEOC Request No. 05970852, 1999 WL 91430 (EEOC Feb. 11, 1999). Complainant’s contact with an EEO Counselor on August 28, 2012, therefore, fell

considered for the vacant permanent position goes to the merits of his complaint. At this stage of the proceedings, the inquiry is limited to whether Complainant has met the procedural requisites to maintain his EEO complaint. See, e.g., Complainant v. U.S. Equal Employment Opp. Commn., EEOC Appeal No. 0120120403, 2013 WL 6145999 (EEOC Nov. 13, 2013) (citing Ferrazzoli v. U.S. Postal Serv., EEOC Request No. 05910642, 1991 WL 1189594 (EEOC Aug. 15, 1991). We find that he has done so.

3 While Employee 2 was converted to permanent status to resolve an EEO complaint he had filed, there is no indication that the reason for his conversion to permanent status was common knowledge. S1 averred that Employee 2 would have qualified for conversion to permanent status in any event.
within the 45-day limitation period and was timely. Accordingly, we remand the complaint for further processing by the Agency consistent with the ruling below.

**EEOC Jurisdiction over Complainant’s Sex Discrimination Claim**

The narrative accompanying his formal complaint makes clear that Complainant believes that he was denied a permanent position because of his sexual orientation. The Agency, in its final decision, indicated it would process this claim only under its internal procedures concerning sexual orientation discrimination and not through the 29 C.F.R. Part 1614 EEO complaint process. The Agency erred in this regard.

Title VII requires that “[a]ll personnel actions affecting [federal] employees or applicants for employment . . . shall be made free from any discrimination based on . . . sex.” 42 U.S.C. § 2000e-16(a). This provision is analogous to the section of Title VII governing employment discrimination in the private sector at 42 U.S.C. § 2000e-2(a)(1) (it is unlawful for a covered employer to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s . . . sex").


This applies equally in claims brought by lesbian, gay, and bisexual individuals under Title VII.

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving

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4 As used in Title VII, the term "sex" "encompasses both sex - that is, the biological differences between men and women - and gender.” See Schwenk v. Hartford, 204 F.3d 1187, 1202 (9th Cir. 2000); see also Smith v. City of Salem, 378 F.3d 566, 572 (6th Cir. 2004) ("The Supreme Court made clear that in the context of Title VII, discrimination because of 'sex' includes gender discrimination."). As the Eleventh Circuit noted in Glenn v. Brumby, 663 F.3d 1312, 1316 (11th Cir. 2011), six members of the Supreme Court in Price Waterhouse agreed that Title VII barred "not just discrimination because of biological sex, but also gender stereotyping - failing to act and appear according to expectations defined by gender." As such, the terms "gender" and "sex" are often used interchangeably to describe the discrimination prohibited by Title VII. See, e.g., Price Waterhouse v. Hopkins at 239 (1989) ("Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute.") (plurality opinion). We do the same in this decision.
allegations of sex discrimination — whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action. 5

In the case before us, we conclude that Complainant’s claim of sexual orientation discrimination alleges that the Agency relied on sex-based considerations and took his sex into account in its employment decision regarding the permanent FLM position. Complainant, therefore, has stated a claim of sex discrimination. Indeed, we conclude that sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII. A complainant alleging that an agency took his or her sexual orientation into account in an employment action necessarily alleges that the agency took his or her sex into account.

Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. “Sexual orientation” as a concept cannot be defined or understood without reference to sex. A man is referred to as “gay” if he is physically and/or emotionally attracted to other men. A woman is referred to as “lesbian” if she is physically and/or emotionally attracted to other women. Someone is referred to as “heterosexual” or “straight” if he or she is physically and/or emotionally attracted to someone of the opposite-sex. See, e.g., American Psychological Ass’n, “Definition of Terms: Sex, Gender, Gender Identity, Sexual Orientation” (Feb. 2011), available at http://www.apa.org/pi/lgbt/resources/sexuality-definitions.pdf (“Sexual orientation refers to the sex of those to whom one is sexually and romantically attracted” (second emphasis added). It follows, then, that sexual orientation is inseparable from and inescapably linked to sex and, therefore, that allegations of sexual orientation discrimination involve sex-based considerations. One can describe this inescapable link between allegations of sexual orientation discrimination and sex discrimination in a number of ways.

5 As we observed in Macy, 2012 WL 1435995 at *6:

“Title VII . . . identifi[es] one circumstance in which an employer may take gender into account in making an employment decision, namely, when gender is a ‘bona fide occupational qualification [(BFOQ)] reasonably necessary to the normal operation of th[e] particular business or enterprise.’” Price Waterhouse, 490 U.S. at 242 (quoting 42 U.S.C. §2000e-2(e)). Even then, “the [BFOQ] exception was in fact meant to be an extremely narrow exception to the general prohibition of discrimination on the basis of sex.” [Dothard v. Rawlinson, 433 U.S. 321, 334 (1977).] See Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (Marshall, J., concurring). “The only plausible inference to draw from this provision is that, in all other circumstances, a person’s gender may not be considered in making decisions that affect her.” Price Waterhouse, 490 U.S. at 242.
Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee’s sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male. That is a legitimate claim under Title VII that sex was unlawfully taken into account in the adverse employment action. See Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (“Such a practice does not pass the simple test of whether the evidence shows ‘treatment of a person in a manner which but for that person’s sex would be different.’”). The same result holds true if the person discriminated against is straight. Assume a woman is suspended because she has placed a picture of her husband on her desk but her gay colleague is not suspended after he places a picture of his husband on his desk. The straight female employee could bring a cognizable Title VII claim of disparate treatment because of sex.

The court in Hall v. BNSF Ry. Co., No. 13-2160, 2014 WL 4719007 (W.D. Wash., Sept. 22 2014) adopted this analysis of Title VII. In that case, the court found that the plaintiff, a male who was married to another male, alleged sex discrimination under Title VII when he stated that he “experienced adverse employment action in the denial of the spousal health benefit, due to sex, where similarly situated females [married to males] were treated more favorably by getting the benefit.” Id. at *2. The court recognized that the sexual orientation discrimination alleged by the plaintiff constituted an allegation that the employer was treating female employees with male partners more favorably than male employees with male partners simply because of the employee’s sex. See also Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002) (“One way (but certainly not the only means) of [alleging a claim under Title VII] is to inquire whether the harasser would have acted the same if the gender of the victim had been different. A jury could find that [Heller’s manager] would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman.”) (internal citations omitted).  

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6 Courts have also adopted this analysis in claims of sex discrimination under Title IX, the Due Process Clause, and the Equal Protection Clause. See Videckis v. Pepperdine Univ., ___ F. Supp. 3d ___, No. 15-298, 2015 WL 1735191 (C.D. Cal., 2015) (“[D]iscrimination based on a same-sex relationship could fall under the umbrella of sexual discrimination [prohibited by Title IX] even if such discrimination were not based explicitly on gender stereotypes. For example, a policy that female basketball players could only be in relationships with males inherently would seem to discriminate on the basis of gender.”); Lawson v. Kelly, ___ F. Supp. 3d ___, No. 14-522, 2014 WL 5810215, at *8 (W.D. Mo. Nov. 7, 2014) (“The State’s permission to marry depends on the genders of the participants, so the restriction is a gender-based classification,” and it violates the Equal Protection Clause); Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 996 (N.D. Cal. 2010) (“Sexual orientation discrimination can take the form of sex discrimination. Here, for example, Perry is prohibited from marrying Stier, a woman, because Perry is a woman. If Perry were a man, Proposition 8 would not prohibit marriage. Thus, Proposition 8 operates to restrict Perry’s choice of marital partner because of
Sexual orientation discrimination is also sex discrimination because it is associational discrimination on the basis of sex. That is, an employee alleging discrimination on the basis of sexual orientation is alleging that his or her employer took his or her sex into account by treating him or her differently for associating with a person of the same sex. For example, a gay man who alleges that his employer took an adverse employment action against him because he associated with or dated men states a claim of sex discrimination under Title VII; the fact that the employee is a man instead of a woman motivated the employer’s discrimination against him. Similarly, a heterosexual man who alleges a gay supervisor denied him a promotion because he dates women instead of men states an actionable Title VII claim of discrimination because of his sex.

In applying Title VII’s prohibition of race discrimination, courts and the Commission have consistently concluded that the statute prohibits discrimination based on an employee’s association with a person of another race, such as an interracial marriage or friendship. See, e.g., Floyd v. Amite County School Dist., 581 F.3d 244, 249 (5th Cir. 2009) (“This court has recognized that . . . Title VII prohibit[s] discrimination against an employee on the basis of a personal relationship between the employee and a person of a different race.”); Holcomb v. Iona Coll., 521 F.3d 130, 138 (2d Cir. 2008) (“We . . . hold that an employer may violate Title VII if it takes action against an employee because of the employee’s association with a person of another race.”). This is because an employment action based on an employee’s relationship with a person of another race necessarily involves considerations of the employee’s race, and thus constitutes discrimination because of the employee’s race.

This analysis is not limited to the context of race discrimination. Title VII “on its face treats each of the enumerated categories — race, color, religion, sex, and national origin — exactly the same.” Price Waterhouse, 490 U.S. at 243 n.9 (“[O]ur specific references to gender throughout this opinion, and the principles we announce, apply with equal force to discrimination based on race, religion, or national origin.”); see also Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 69 n.6 (2d Cir. 2000) (“[T]he same standards apply to both race-based and sex-based hostile environment claims.”); Williams v. Owens-Illinois, Inc., her sex.”), aff’d sub nom., Perry v. Brown, 671 F.3d 1052 (9th Cir. 2012), vacated and remanded sub nom, Hollingsworth v. Perry, 133 S. Ct. 2652 (2013).

See also Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir.1999) (“A white employee who is discharged because his child is biracial is discriminated against on the basis of his race . . . .”); Hancock v. Dep’t of Transp., EEOC Appeal No. 01922416, 1992 WL 1371812 (EEOC Dec. 2, 1991), req. for recon. den., EEOC Request No. 05930356, 1993 WL 1510013 (EEOC Sept. 30, 1993) (“[A]n individual may be entitled to protection by virtue of association with a member of a protected class . . . .”); Robertson v. U.S. Postal Serv., EEOC Appeal No. 0120113558, 2013 WL 3865026 (EEOC Jul. 18, 2013), n. 1 (association discrimination may be established where evidence permits the inference that an agency’s act or omission would not have occurred if the complainant and associate were of the same race).
Therefore, Title VII similarly prohibits employers from treating an employee or applicant differently than other employees or applicants based on the fact that such individuals are in a same-sex marriage or because the employee has a personal association with someone of a particular sex. Adverse action on that basis is, “by definition,” discrimination because of the employee or applicant’s sex. Cf. Parr v. Woodmen of the World Life Ins. Co., 791 F.2d 888, 892 (11th Cir. 1986) (“Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race [in violation of Title VII].”); Schroer v. Billington, 577 F. Supp. 2d 293, 307 n.8 (D.D.C. 2008) (“Discrimination because of race has never been limited only to discrimination for being one race or another. Instead, courts have recognized that Title VII’s prohibition against race discrimination protects employees from being discriminated against because of an interracial marriage, or . . . friendships.”).

Sexual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes. In Price Waterhouse, the Court reaffirmed that Congress intended Title VII to “strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” 490 U.S. at 251 (quoting Los Angeles Dep’t of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978)). In the wake of Price Waterhouse, courts and the Commission have recognized that lesbian, gay, and bisexual individuals can bring claims of gender stereotyping under Title VII if such individuals demonstrate that they were treated adversely because they were viewed—based on their appearance, mannerisms, or conduct—as insufficiently “masculine” or “feminine.” 8 But as the Commission9 and a number

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8 See Smith v. City of Salem, Ohio, 378 F.3d 566, 574 (6th Cir. 2004) (“It follows [from Price Waterhouse] that employers who discriminate against men because they . . . act femininely[ ] are also engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”); EEOC v. Boh Brothers, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) (“[A] jury could view Wolfe’s behavior as an attempt to denigrate Woods because — at least in Wolfe’s view — Woods fell outside of Wolfe’s manly-man stereotype” and that would constitute sex discrimination in violation of Title VII).

9 See Veretto v. United States Postal Service, EEOC Appeal No. 0120110873, 2011 WL 2663401 (EEOC July 1, 2011) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that marrying a woman is an essential part of being a man); Castello v. U.S. Postal Service, EEOC Request No. 0520110649, 2011 WL 6960810 (EEOC Dec. 20, 2011) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on the sex stereotype that having relationships with men is an essential part of being a woman); Baker v. Social Security Administration, EEOC Appeal No. 0120110008, 2013 WL 1182258 (EEOC January 11, 2013) (complainant’s allegation of sexual orientation discrimination was a claim of sex discrimination because it was based on his gender non-
of federal courts\textsuperscript{10} have concluded in cases dating from 2002 onwards, discrimination against people who are lesbian, gay, or bisexual on the basis of gender stereotypes often involves far more than assumptions about overt masculine or feminine behavior.

\textsuperscript{10} See \textit{Centola v. Potter}, 183 F. Supp. 2d 403, 410 (D. Mass. 2002); \textit{Heller}, 195 F. Supp. 2d at 1224 (D. Or. 2002) (“[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle’s stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men.”); \textit{Koren v. Ohio Bell}, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (“And here, Koren chose to take his spouse’s surname—a "traditionally" feminine practice—and his co-workers and superiors observed that gender non-conformance when Koren requested to be called by his married name.”); \textit{Terveer v. Billington}, 34 F. Supp. 3d 100, 116, 2014 WL 1280301 (D.D.C. 2014) (plaintiff stated a claim of discrimination on the basis of sex when he “alleged that he is a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles, that his status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under Mech’s supervision or at the LOC, and that his orientation as homosexual had removed him from Mech’s preconceived definition of male.”) (internal citations and quotes omitted); \textit{Boutillier v. Hartford Public Schools}, 2014 WL 4794527 (D. Conn. 2014) (denying an employer’s motion to dismiss by finding that plaintiff, a lesbian, had set forth a plausible claim that she was discriminated against based on sex due to her non-conforming gender behavior); \textit{Deneffe v. SkyWest, Inc.}, 2015 WL 2265373, at *6 (D. Colo. May 11, 2015) (denying employer’s motion to dismiss by finding that plaintiff, a homosexual male, had sufficiently alleged that he failed to conform to male stereotypes by not taking part in male “braggadocio” about sexual exploits with women, not making jokes about gay pilots, designating his same-sex partner as beneficiary, and flying with his same sex partner on employer flights) Cf. \textit{Latta v. Otter}, 771 F.3d 456, 474 (9th Cir. 2014), \textit{petition for cert. filed}, (U.S. Dec. 31, 2014) (No. 14-765) (finding that plaintiffs had sufficiently established that marriage laws in Idaho and Nevada violated the Equal Protection Clause of the Fourteenth Amendment by discriminating on the basis of sexual orientation, but also stating that “the constitutional restraints the Supreme Court has long imposed on sex-role stereotyping . . . may provide another potentially persuasive answer to defendant’s theory.”); Id. at 495 (Berzon, J. concurring) (“[I]t bears noting that the social exclusion and state discrimination against lesbian, gay, bisexual, and transgender people reflects, in large part, disapproval of their nonconformity with gender-based expectations.”).
Sexual orientation discrimination and harassment “[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.” Centola v. Potter, 183 F. Supp. 2d 403, 410 (D. Mass. 2002). The Centola court continued:

In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women. While one paradigmatic form of stereotyping occurs when co-workers single out an effeminate man for scorn, in fact, the issue is far more complex. The harasser may discriminate against an openly gay co-worker, or a co-worker that he perceives to be gay, whether effeminate or not, because he thinks, “real” men should date women, and not other men.

Id.

Those deeper assumptions and stereotypes about “real” men and “real” women were similarly noted by the court in Terveer v. Library of Congress in rejecting the government’s motion to dismiss:

Under Title VII, allegations that an employer is discriminating against an employee based on the employee’s non-conformity with sex stereotypes are sufficient to establish a viable sex discrimination claim. See Price Waterhouse v. Hopkins, 490 U.S. 228, 251 (1989) (“we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group.”). Here, Plaintiff has alleged that he is “a homosexual male whose sexual orientation is not consistent with the Defendant’s perception of acceptable gender roles,” that his “status as a homosexual male did not conform to the Defendant’s gender stereotypes associated with men under [his supervisor’s] supervision or at the LOC,” and that “his orientation as homosexual had removed him from [his supervisor’s] preconceived definition of male.” As Plaintiff has alleged that Defendant denied him promotions and created a hostile work environment because of Plaintiff’s nonconformity with male sex stereotypes, Plaintiff has met his burden of setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”

In the past, courts have often failed to view claims of discrimination by lesbian, gay, and bisexual employees in the straightforward manner described above. Indeed, many courts have gone to great lengths to distinguish adverse employment actions based on “sex” from adverse employment actions based on “sexual orientation.” The stated justification for such intricate parsing of language has been the bare conclusion that “Title VII does not prohibit . . . discrimination because of sexual orientation.” Dawson v. Bumble & Bumble, 398 F.3d 211, 217 (2d Cir. 2005) (quoting Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000)). For that reason, courts have attempted to distinguish discrimination based on sexual orientation from discrimination based on sex, even while noting that the “borders [between the two classes] are . . . imprecise.” Id. (alteration in original).

Some of these decisions reason that Congress in 1964 did not intend Title VII to apply to sexual orientation and, therefore, Title VII could not be interpreted to prohibit such discrimination. See, e.g., DeSantis v. Pacific Telephone & Telegraph Co., 608 F.2d 327, 329 (9th Cir. 1979) (“Congress had only the traditional notions of ‘sex’ in mind” when it passed Title VII and those “traditional notions” did not include sexual orientation or sexual preference.) abrogated by Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864, 875 (9th Cir. 2001).

11 A review of cases cited for the proposition that sexual orientation is excluded from Title VII reveals that many courts simply cite earlier and dated decisions without any additional analysis. For example, in a brief to the Seventh Circuit Court of Appeals requesting rehearing based on various broad declaratory statements that Title VII does not cover sexual orientation, the EEOC pointed out that only one previous Seventh Circuit case had analyzed the question of coverage of sexual orientation discrimination under Title VII and that case, decided in 1984, had not been reviewed in light of subsequent decisions such as Price Waterhouse. Instead, a string of Seventh Circuit panel decisions had simply reiterated the holding in the first case without any further discussion. Br. EEOC Supp. Reh’g 8-9, Muhammad v. Caterpillar Inc., ECF No. 49, No. 12-1723 (7th Cir. Oct. 7, 2014). The Seventh Circuit denied the request for rehearing but reissued its decision without the statements that sexual orientation discrimination is not covered under Title VII. See Muhammad v. Caterpillar, 767 F.3d 694 (7th Cir. 2014), 2014 WL 4418649 (7th Cir. Sept. 9, 2014, as Amended on Denial of Rehearing, Oct. 16, 2014).

12 We do not view the borders between sex discrimination and sexual orientation as “imprecise.” As we note above, discrimination on the basis of sexual orientation necessarily involves discrimination on the basis of sex.

13 Indeed, the Equal Employment Opportunity Commission’s own understanding of Title VII’s application to sexual orientation discrimination has developed over time. Compare Johnson v. U.S. Postal Serv., EEOC Appeal No. 01911827, 1991 WL 1189760, at *3 (EEOC Dec. 19, 1991) (holding that Title VII’s prohibition of discrimination based on sex does not include sexual preference or sexual orientation), and Morrison v. Dep’t of the Navy, EEOC Appeal No. 01930778, 1994 WL 746296, at *3 (EEOC June 16, 1994) (affirming that Title VII’s discrimination prohibition does not include sexual preference or orientation as a basis), with Morris v. U.S. Postal Serv., EEOC Appeal No. 01974524, 2000 WL 226001, at *1-2 (EEOC Feb. 9, 2000) (distinguishing Johnson and Morrison and holding that
Congress may not have envisioned the application of Title VII to these situations. But as a unanimous Court stated in Oncale v. Sundowner Offshore Services, Inc., “statutory prohibitions often go beyond the principal evil [they were passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.” 523 U.S. 75, 79, 78-80 (1998) (holding that same-sex harassment is actionable under Title VII). Interpreting the sex discrimination prohibition of Title VII to exclude coverage of lesbian, gay or bisexual individuals who have experienced discrimination on the basis of sex inserts a limitation into the text that Congress has not included. 14 Nothing in the text of Title VII “suggests that Congress intended to confine the benefits of [the] statute to heterosexual employees alone.” Heller v. Columbia Edgewater Country Club, 195 F. Supp. 2d. 1212, 1222 (D. Or. 2002).

Some courts have also relied on the fact that Congress has debated but not yet passed legislation explicitly providing protections for sexual orientation. See Bibby v. Phila. Coca Cola Bottling Co., 260 F.3d 257, 261 (3d Cir. 2001) (“Congress has repeatedly rejected legislation that would extend Title VII to cover sexual orientation.”). 15 But the Supreme Court has ruled that “[c]ongressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change.” Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (citation omitted) (internal quotation marks omitted).

The complainant stated a valid Title VII claim by alleging that her female supervisor and former lover discriminated against her on the basis of her sex. Former Acting Chairman of the EEOC Stuart Ishimaru acknowledged the varying protections extended to LGBT employees and explained that federal decisions have been inconsistent in this area. See Employment Non-Discrimination Act of 2009: Hearing on H.R. 3017 Before the H. Comm. on Educ. & Labor, 111th Cong. (2009) (statement of Stuart J. Ishimaru, Acting Chairman, U.S. Equal Employment Opportunity Commission).

14 Title VII prohibits discrimination on the basis of “sex” without further definition or restriction and it is not our province to modify that text by adding limitations to it. As the Supreme Court noted recently in a different context, “[t]he problem with this approach is the one that inheres in most incorrect interpretations of statutes: It asks to add words to the law to produce what is thought to be a desirable result. That is Congress’s province.” EEOC v. Abercrombie & Fitch Stores, Inc., 575 U.S. ___ (2015), 135 S.Ct. 2028, 2033, 2015 WL 2464053, *4 (2015).

15 See also Medina v. Income Support Div., 413 F.3d 1131, 1135 (10th Cir. 2005) (citing Bibby and Simonton (see infra) with approval); Rene v. MGM Grand Hotel, Inc., 243 F.3d 1206, 1209 (9th Cir. 2001) (“Title VII has not been amended to prohibit discrimination based on sexual orientation.”); Simonton v. Runyon, 232 F.3d 33, 35 (2d Cir. 2000) (“Congress’s refusal to expand the reach of Title VII is strong evidence of congressional intent.”).
The idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. But analogous case law confirms this is not true. When courts held that Title VII protected persons who were discriminated against because of their relationships with persons of another race, the courts did not thereby create a new protected class of “people in interracial relationships.” See e.g., Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 581, 588–89 (5th Cir. 1998), reinstated in relevant part, Williams v. Wal-Mart Stores, Inc., 182 F.3d 333 (5th Cir. 1999) (en banc). And when the Supreme Court decided that Title VII protected persons discriminated against because of gender stereotypes held by an employer, it did not thereby create a new protected class of “masculine women.” See Price Waterhouse, 490 U.S. at 239–40 (plurality opinion). Similarly, when ruling under Title VII that discrimination against an employee because he lacks religious beliefs is religious discrimination, the courts did not thereby create a new Title VII basis of “non-believers.” See, e.g., EEOC v. Townley Eng’g & Mfg. Co., 859 F. 2d. 610, 621 (9th Cir. 1988). These courts simply applied existing Title VII principles on race, sex, and religious discrimination to these situations. Further, the Supreme Court was not dissuaded by the absence of the word “mothers” in Title VII when it decided that the statute does not permit an employer to have one hiring policy for women with pre-school children and another for men with pre-school children. See Phillips v. Martin-Marietta, 400 U.S. 542, 543-44 (1971) (per curiam). The courts have gone where the principles of Title VII have directed.

Our task is the same. We apply the words of the statute Congress has charged us with enforcing. We therefore conclude that Complainant’s allegations of discrimination on the basis of sexual orientation state a claim of discrimination on the basis of sex. We further conclude that allegations of discrimination on the basis of sexual orientation necessarily state a claim of discrimination on the basis of sex. An employee could show that the sexual orientation discrimination he or she experienced was sex discrimination because it involved treatment that would not have occurred but for the individual’s sex; because it was based on the sex of the person(s) the individual associates with; and/or because it was premised on the fundamental sex stereotype, norm, or expectation that individuals should be attracted only to those of the opposite sex. Agencies should treat claims of sexual orientation discrimination as complaints of sex discrimination under Title VII and process such complaints through the ordinary Section 1614 process.

We recognize that many agencies also have separate complaint processes in place for claims of sexual orientation discrimination. Agencies may maintain, and employees may still utilize, these procedures if they wish. But the 1614 process is the most appropriate method for resolving these claims. Agencies should make applicants and employees aware that claims of sexual orientation discrimination will ordinarily be processed under Section 1614 as claims of sex discrimination unless the employee requests that the alternative complaint process be used.

There may be other theories for establishing sexual orientation discrimination as sex discrimination, on which we express no opinion.
CONCLUSION

Accordingly, we conclude that Complainant’s allegations of discrimination on the basis of his sexual orientation state a claim of discrimination on the basis of sex within the meaning of Title VII. Furthermore, we conclude that Complainant’s initial EEO Counselor contact was timely. We remand the Complainant’s claim of discrimination to the Agency for further processing for a determination on the merits.

ORDER

The Agency is ORDERED to continue processing the remanded claims. The Agency shall acknowledge to the Complainant that it has received the remanded claims within thirty (30) calendar days of the date this decision becomes final. The Agency shall reissue to Complainant a copy of the investigative file and also shall notify Complainant of the appropriate rights within thirty (30) calendar days of the date this decision becomes final, unless the matter is otherwise resolved prior to that time. If the Complainant requests a final decision without a hearing, the Agency shall issue a final decision on the merits of his discrimination claims within sixty (60) days of receipt of Complainant’s request.

A copy of the Agency’s letter of acknowledgment to Complainant and a copy of the notice that transmits the investigative file and notice of rights must be sent to the Compliance Officer as referenced below.

IMPLEMENTATION OF THE COMMISSION’S DECISION (K0610)

Compliance with the Commission’s corrective action is mandatory. The Agency shall submit its compliance report within thirty (30) calendar days of the completion of all ordered corrective action. The report shall be submitted to the Compliance Officer, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. The Agency’s report must contain supporting documentation, and the Agency must send a copy of all submissions to the Complainant. If the Agency does not comply with the Commission’s order, the Complainant may petition the Commission for enforcement of the order. 29 C.F.R. § 1614.503(a). The Complainant also has the right to file a civil action to enforce compliance with the Commission’s order prior to or following an administrative petition for enforcement. See 29 C.F.R. §§ 1614.407, 1614.408, and 29 C.F.R. § 1614.503(g). Alternatively, the Complainant has the right to file a civil action on the underlying complaint in accordance with the paragraph below entitled “Right to File a Civil Action.” 29 C.F.R. §§ 1614.407 and 1614.408. A civil action for enforcement or a civil action on the underlying complaint is subject to the deadline stated in 42 U.S.C. 2000e-16(c) (1994 & Supp. IV 1999). If the Complainant files a civil action, the administrative processing of the complaint, including any petition for enforcement, will be terminated. See 29 C.F.R. § 1614.409.
STATEMENT OF RIGHTS - ON APPEAL

RECONSIDERATION (M0610)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tends to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or

2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision or within twenty (20) calendar days of receipt of another party’s timely request for reconsideration. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at 9-18 (November 9, 1999). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission, P.O. Box 77960, Washington, DC 20013. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (R0610)

This is a decision requiring the Agency to continue its administrative processing of your complaint. However, if you instead wish to file a civil action, you have the right to file such action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. In the alternative, you may file a civil action after one hundred and eighty (180) calendar days of the date you filed your complaint with the Agency, or filed your appeal with the Commission. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. Filing a civil action will terminate the administrative processing of your complaint.
RIGHT TO REQUEST COUNSEL (Z0610)

If you decide to file a civil action, and if you do not have or cannot afford the services of an attorney, you may request from the Court that the Court appoint an attorney to represent you and that the Court also permit you to file the action without payment of fees, costs, or other security. See Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 791, 794(c). The grant or denial of the request is within the sole discretion of the Court. Filing a request for an attorney with the Court does not extend your time in which to file a civil action. Both the request and the civil action must be filed within the time limits as stated in the paragraph above (“Right to File a Civil Action”).

FOR THE COMMISSION:

Bernadette B. Wilson

Bernadette B. Wilson
 Acting Executive Officer
 Executive Secretariat

07/15/2015
Date