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

IN THE

Supreme Court of the United States

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

ALTITUDE EXPRESS, INC. AND RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION IN SUPPORT OF THE EMPLOYEES

ALICE O'BRIEN
ERIC A. HARRINGTON
NATIONAL EDUCATION ASSOCIATION
1201 16th St., N.W.
Washington, D.C. 20036
(202) 822-7018

JEFFREY A. LAMKEN
Counsel of Record
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

(*Additional Caption & Counsel Listed on Inside Cover*)

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AND AIMEE STEPHENS,
Respondents.

DAVID STROM
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 393-7472

GERALD MEYER
JORDAN A. RICE
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6700

FRANCISCO M. NEGRÓN, JR.
SONJA TRAINOR
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St., Fl. 2
Alexandria, VA 22314
(703) 838-6722

W. ALEX HARRIS
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022
(212) 607-8160

Counsel for Amici Curiae

QUESTIONS PRESENTED

In Nos. 17-1618 and 17-1623, the question presented is: Whether discrimination against an employee because of sexual orientation constitutes prohibited employment discrimination "because of * * * sex" within the meaning of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.

In No. 18-107, the question presented is: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

NOS. 17-1618, 17-1623, & 18-107

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

ALTITUDE EXPRESS, INC. AND RAY MAYNARD,
Petitioners,
v.
MELISSA ZARDA AND WILLIAM MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA,
Respondents.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
Petitioner,
v.
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
AND AIMEE STEPHENS,
Respondents.

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

BRIEF OF *AMICI CURIAE* NATIONAL EDUCATION ASSOCIATION, AMERICAN FEDERATION OF TEACHERS, NATIONAL SCHOOL BOARDS ASSOCIATION, AND AASA, THE SCHOOL SUPERINTENDENTS ASSOCIATION IN SUPPORT OF THE EMPLOYEES

INTEREST OF *AMICI CURIAE*[1]

The National Education Association ("NEA") is the Nation's oldest and largest professional association of educators. NEA has some 3 million members, including counselors, education support professionals, and teachers. The American Federation of Teachers ("AFT"), an affiliate of the AFL-CIO, was founded in 1916 and represents approximately 1.7 million members employed across the Nation in public schools, higher education, government service, and healthcare. As part of their missions, NEA and AFT promote civic education, emphasizing the importance of the rule of law and the structure of our government. Also, NEA and AFT strive to instill the values of civility and respect in students, fostering a safe school environment free from all harassment, intimidation, and discrimination, and preparing students for life as members of our Republic. NEA and AFT thus believe that educators and students should be free from discrimination based on their sexual orientation or gender identity.

The National School Boards Association ("NSBA") represents state associations of school boards across the country as well as more than 90,000 local school board members. Representing more than 13,000 school system leaders, AASA, The School Superintendents Association ("AASA"), advocates for the highest quality public education for all students. Combined, the Nation's public schools constitute the largest employer in the United

---

[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief; and no person other than *amici*, their members, and their counsel made such a contribution. All parties have consented to the filing of this brief.

States, employing over 7 million people. NSBA and AASA seek to ensure that school boards and superintendents can efficiently navigate their regulatory environment. The application of clear, administrable rules is central to that cause. NSBA and AASA also aim to ensure that schools are able to secure teachers and staff from a broad pool of qualified talent to support the highest quality education.

Amici have a profound interest in ensuring that Title VII's text is applied according to its plain terms. NEA and AFT represent the interests of educators and school staff (labor), and NSBA and AASA the interests of school boards and superintendents (management). But *amici* are united in seeking to ensure that the educational mission of our schools is fulfilled. That result is best achieved when employment decisions for teachers and school staff focus on merit—their ability to educate children—rather than irrelevant characteristics. Title VII's text leads to precisely that result. Interpreting Title VII in accordance with its text, moreover, reflects our constitutional system of government, under which Congress creates written law, and courts apply the law according to its terms.

Following Title VII's text also furthers the goal of providing clear, administrable rules. That value is of particular importance to NSBA and AASA. NSBA, AASA, and their members need simple and administrable guidance so that they, and their employees, can comply and can be taught to comply with the law. Moreover, one of the greatest challenges confronting our education system today is recruiting and retaining qualified teachers and school staff. Title VII's plain text ensures that schools have access to and retain the sort of expansive and diverse talent pool that has been proven, time and

again, to promote educational success. Finally, students are more likely to achieve, and more likely to remain in school, where the educational environment is respectful and inclusive, ensuring that the students are free from harassment or discrimination. Protecting teachers and school staff from discrimination promotes a respectful and inclusive school environment staffed by the most qualified individuals available.

SUMMARY OF ARGUMENT

I. A. This Court has long recognized that matters of statutory construction begin with the statute's text. Title VII prohibits discrimination in employment "*because of* * * * sex." 42 U.S.C. §2000e-2(a)(1) (emphasis added). That directive encompasses a familiar causal analysis that is easy to apply: Where an adverse employment outcome would not have occurred but for the employee's sex—where the employment decision would change if the employee were the opposite sex or if the employee's sex were ignored entirely—Title VII's "because of * * * sex" standard is met.

B. To resolve these cases, the Court need only apply that statutory standard as written. As a matter of plain text, the "because of * * * sex" standard encompasses the discrimination alleged in these cases. For example, Mr. Zarda's complaint alleges that he was dismissed because he was gay, *i.e.*, because *Mr. Zarda* was a *man* who was attracted to *men*. As a matter of text, that *is* discrimination "because of" Mr. Zarda's sex: If Zarda had been *a woman* with the exact same attraction to *men*, he would have kept his job. Changing one and only one factor, Mr. Zarda's sex, changes the outcome. Because the adverse employment action would not have occurred but for the employee's sex—because changing Mr. Zarda's sex or ignoring it entirely would have changed the outcome—

the adverse action was "because of * * * sex" within the meaning of Title VII. To decide these cases, this Court need decide no more. In each case, the alleged adverse employment action would not have occurred if the employee were of the opposite sex or the employee's sex were ignored.

C. This Court's precedent confirms that plain reading of Title VII. In case after case, this Court has asked whether the outcome would have been different if the employee's sex were different. That same analysis applies in the same way here.

D. The contrary view—that Title VII does not reach discrimination "because of" sexual orientation or gender status—has no basis in the statute's text. The Court should apply Title VII according to its terms, not according to assumptions about what Congress contemplated when it passed Title VII. Title VII's language is clear.

II. A. *Amici* are dedicated to the educational mission of the Nation's public schools. This case calls on the Court to honor Title VII's plain text, consistent with rule-of-law principles and the clarity needed by those governed by the statute's terms. The written word and written law matter. That principle is central to Western Civilization and to our government. Throughout our history, we have relied on written laws to provide clarity to those who apply them and those who must live by them. Applying Title VII's plain text here honors that history.

B. Adherence to Title VII's plain text is also critical to providing an understandable regime that employers can apply and follow. If changing the employee's sex or ignoring it would alter the outcome, the decision is "because of * * * sex." Departing from Title VII's clear

text—whether based on presumptions about Congress's intent, or by changing the level of abstraction for critical inquiries—creates hidden exceptions and detours that make the law difficult for employers to understand and to follow.

C. Finally, applying Title VII's clear text ensures that public schools and other employers will be able to draw from the broadest pool of qualified talent, regardless of non-merit-based characteristics. And barring discrimination in public schools ultimately serves the critical interests of protecting students from harassment and enhancing the learning environment.

ARGUMENT

Amici are dedicated to the educational mission of the Nation's public schools. In *amici*'s view, this case calls on the Court to follow Title VII's plain text—to honor Title VII's language consistent with rule-of-law principles and the clarity needed by those governed by that statute. By its terms, Title VII bars employment discrimination "because of * * * sex." That standard encompasses the sorts of discrimination alleged in these cases. To take one example, Mr. Zarda's complaint alleges that he was dismissed because he was gay, *i.e.*, because *Mr. Zarda* was a *man* who was attracted to *men*. As a matter of text, that *is* discrimination "because of" Mr. Zarda's sex: If Zarda had been a woman—with the exact same attraction to men—he would have kept his job. Where the adverse employment action would not have occurred but for the employee's sex—where changing an employee's sex or ignoring it entirely would have changed the outcome—the adverse action is "because of * * * sex" under Title VII. To decide these cases, this Court need decide no more. See No. 17-1623, Pet. App. 68 (Cabranes, J., concurring); *id.* at 64 (Jacobs, J., concurring).

In our system of government, the statutory text—the words enacted into law—*is* the law.

Faithfully adhering to Title VII's clear text is of particular importance to *amici*. *Amici* represent the range of interests related to the educational mission of the Nation's public schools. NEA and AFT represent the interests of educators; NSBA and AASA represent the interests of school management. Despite their different perspectives, *amici* are united in the view that adherence to the plain meaning of Title VII—the direct result of applying its text—is critical to the educational mission they pursue. From NSBA and AASA's perspective in particular, the clear, direct language of Title VII's text—which bars outcomes that depend on an individual's sex—provides a clear and administrable framework that can be taught and applied. A contrary reading introduces impossible uncertainties of administration.

All *amici*, moreover, understand the importance of recruiting, retaining, and developing the best educators and school staff from the broadest pool of talent. A high-quality school workforce produces academic achievement and career readiness. Title VII's plain text focuses on qualities that matter—merit—and away from irrelevant characteristics that would unnecessarily limit the talent pool. Finally, following Title VII's plain language—which prohibits discrimination because of sex, race, religion, etc. in all its forms—promotes supportive learning environments, free from discrimination, harassment, and intimidation. A law that protects educators, administrators, and other school staff from discrimination serves that mission.

I. TITLE VII'S PLAIN TEXT CONTROLS THESE CASES

As with all matters of statutory construction, the inquiry here "begin[s] with the text of the statute."

Limtiaco v. *Camacho*, 549 U.S. 483, 488 (2007). Here, Title VII's text, logic, and precedent provide a clear answer.

A. Title VII's Plain Text Prohibits Adverse Employment Action Because of—Where the Outcome Would Change With—the Employee's Sex

Title VII's textual command is straightforward: It is unlawful to refuse an individual employment "or otherwise to discriminate against any individual with respect to" the terms and conditions of employment "*because of* such individual's race, color, religion, *sex*, or national origin." 42 U.S.C. §2000e-2(a)(1) (emphasis added). The statute thus prohibits differential treatment "because of * * * sex," just as it prohibits differential treatment "because of * * * race." That standard is clearly met where changing the individual's sex—but nothing else—would have changed the personnel action.

That flows directly from the statute's use of the phrase "because of." The word "because" means "[b]y or for the cause that." *Webster's New International Dictionary* 242 (2d ed. 1953). Similarly, the phrase "because of" means "[b]y reason of" or "on account of." *Ibid.*; see *Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 350 (2013) ("because of" in Title VII means "by reason of" or "on account of"); *Gross* v. *FBL Fin. Servs., Inc.*, 557 U.S. 167, 176 (2009) ("because of" in the Age Discrimination in Employment Act means "by reason of" or "on account of").

As this Court has explained, Title VII's "because of" standard is met by "the traditional standard of but-for causation." *EEOC* v. *Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2032 (2015); see *City of Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702, 711 (1978)

(equating "because of" as used in Title VII with but-for causation). For example, in the (somewhat different) retaliation context, "Title VII retaliation claims must be proved according to traditional principles of but-for causation." *Nassar*, 570 U.S. at 360. As the Court has explained, that includes "proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer." *Ibid.*[2]

Title VII's text thus embraces a causal standard that permeates the law.[3] Where an adverse action would *not* have occurred but for the individual's sex—where changing the employee's sex or ignoring it entirely would have changed the outcome—Title VII's "because of" standard is met. *Manhart*, 435 U.S. at 711; see *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 436 (1971) (noting that, with Title VII, Congress made "race, religion, nationality, and sex become irrelevant").

---

[2] Critically, the standard of "but for" causation does not require the prohibited consideration to be the "sole" or "principal" cause of the decision. An event may have many causes; each qualifies as a "but for" cause so long as the event or act would not have occurred in its absence. See *Gross*, 557 U.S. at 176-177 ("An act or omission is not regarded as a cause of an event if the particular event would have occurred without it." (quoting W. Keeton et al., *Prosser and Keeton on the Law of Torts* 265 (5th ed. 1984))); *McDonald* v. *Santa Fe Trail Transp. Co.*, 427 U.S. 273, 282 n.10 (1976).

[3] Title VII also bars sex, race, religion, etc. from even being a "motivating factor" in employment decisions. *Abercrombie*, 135 S. Ct. at 2032 (quoting 42 U.S.C. § 2000e-2(m)); see also 42 U.S.C. § 2000e-5(g)(2) (limiting relief where impermissible consideration of sex, race, or religion is a "motivating factor" but the employer can show it "would have taken the same action in the absence of the impermissible motivating factor"). While *amici* focus on the more demanding causal standard of § 2000e-2(a), the same result would apply *a fortiori* under a more relaxed motivating-factor standard.

B. Adverse Employment Action Based on Sexual Orientation or Gender Status Meets Title VII's "Because of * * * Sex" Standard

There are familiar and obvious situations in which Title VII's "because of * * * sex" prohibition is met. For example, a female applicant is not offered a position, but she would have been offered the job had she been a man. When that happens, Title VII's "because of" standard is clearly satisfied: If the applicant had not been a woman, the adverse result would not have occurred. Likewise, if the applicant's sex had (properly) been deemed irrelevant, she would not have been passed over for the position in favor of a man. Because the adverse result would *not* have taken place but for the individual's sex or its consideration—*i.e.*, hypothetically changing the applicant's sex or excluding it would have changed the outcome—Title VII's "because of" standard is plainly met.

A similarly direct application of Title VII's text yields a similarly clear result here. For example, in No. 17-1623, Mr. Zarda alleged he was dismissed from his job as a skydiving instructor because he was gay—that is, because he was *a man* who was attracted to *men*. No. 17-1623, Pet. App. 11-12. Mr. Zarda alleged he would *not* have been subject to that adverse employment action if one and only one fact were different—his sex. If Zarda had been a *woman* who was attracted to *men*, Zarda would *not* have been fired. As a matter of inescapable logic, Mr. Zarda was fired because of his sex. Those circumstances satisfy Title VII's "because of * * * sex" standard.

Similarly, in No. 18-107, Ms. Stephens alleged she was fired because she is transgender, *i.e.*, because she identifies and presents herself as female despite having been identified as male at birth. No. 18-107, Pet. App. 3a-5a,

9a-10a. Like Mr. Zarda, Ms. Stephens would not have been fired if one and only one fact changed—her birth sex. If Ms. Stephens' birth sex had been female, and she presented herself as female, she would not have been fired. Likewise, if Ms. Stephens' sex were ignored, she would not have been fired. But because Ms. Stephens' birth sex was male, and she informed her employer that she identified and would present herself as a woman, she lost her job. Again, because the adverse employment action turned on consideration of Ms. Stephens' sex, it falls within Title VII's prohibition on discrimination "because of * * * sex."

Examining the same logical relationship in the context of race underscores that Title VII's text permits no other conclusion. For example, if an African-American man were fired because he married a white woman (or dated a white woman), that unquestionably would violate Title VII's prohibition on discrimination "because of * * * race." The "because of" standard would be met because changing the employee's race—or excluding it from consideration—would change the outcome. If the employee were white, he would not have been fired for having married a white woman (or having dated a white woman). But because the employee is an African-American man who married a white woman (or dated a white woman), he loses his job. The action is "because of * * * race"; his race is determinative. As one court observed, "[w]here 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."

Parr v. *Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986).[4]

The same textual "because of" standard applies in precisely the same fashion, and leads to the same results, across the board.[5] Title VII's "because of * * * sex" standard is met where, as here, changing or ignoring the employee's sex would have reversed the employment decision at issue.

Because the statutory text is so clear, little more need be said. As Judge Cabranes observed in No. 17-1623, this "is a straightforward case of statutory construction." No. 17-1623, Pet. App. 68 (Cabranes, J., concurring).

---

[4] Accord *Holcomb* v. *Iona Coll.*, 521 F.3d 130, 132 (2d Cir. 2008) (Title VII prohibits an employer from taking action against an employee "because of the employee's association with a person of another race"); *Deffenbaugh–Williams* v. *Wal–Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (same), *vacated sub nom.*, *Williams* v. *Wal-Mart Stores*, 169 F.3d 215 (5th Cir. 1999) (en banc), *and reinstated in relevant part sub nom.*, *Williams* v. *Wal-Mart Stores*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Tetro* v. *Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-995 (6th Cir. 1999) (employee discharged for having biracial child "is discriminated against on the basis of his race").

[5] Thus, for example, ordinary public employers would not be permitted to fire an employee of one faith for converting to another (*e.g.*, from Christianity to Judaism). It would make no difference if the employer harbored no animus against either faith, but merely disapproved of conversion. Absent some exemption, *e.g.*, 42 U.S.C. § 2000e-1(a), the conduct would still fall within Title VII's prohibition on discrimination "because of" religion: Absent consideration of the employee's religion (new or old), the conduct would not have occurred. "Discrimination 'because of religion' easily encompasses discrimination because of a *change* of religion." *Schroer* v. *Billington*, 577 F. Supp. 2d 293, 306 (D.D.C. 2008).

> Title VII of the Civil Rights Act of 1964 prohibits discrimination "because of . . . sex." 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.

Ibid. (citation omitted). Or, as Judge Jacobs put it, Mr. Zarda had a valid "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"—when a woman who had the identical relationship with a man would not have been. *Id.* at 62 (Jacobs, J., concurring).[6] "That should be the end of the analysis." *Id.* at 68 (Cabranes, J., concurring).

C. Precedent Confirms What Title VII's Plain Text Compels

This Court's precedent confirms what Title VII's text makes clear—adverse action based on sexual orientation or gender status *is* discrimination "because of * * * sex."

More than four decades ago, this Court considered whether requiring female employees to make larger pension contributions than male employees violates Title VII. *Manhart*, 435 U.S. at 704. The employer argued that its policy was based on the increased longevity of women, and not "because of * * * sex." *Id.* at 712. The Court rejected that argument because the practice did not pass the "simple test" of asking whether the outcome

---

[6] See also No. 18-107, Pet. App. 24a ("Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex impermissibly affected [the employer's] decision to fire Stephens.").

would change "but for" the employee's sex. *Id.* at 711. Because changing the employee's sex would change the amount she was required to pay—the employee's sex determined the outcome—the policy was discrimination "because of * * * sex." *Ibid.*

This Court's decision in *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989), makes that clearer still. In *Price Waterhouse*, a female employee alleged she was denied a promotion for failure to conform to sex-based expectations—specifically, for her supposedly unfeminine behavior and failure to wear jewelry and makeup. *Id.* at 235, 250 (plurality opinion). This Court held that such allegations state a claim of differential treatment "because of * * * sex" under Title VII. *Id.* at 250-252; *id.* at 258-259 (White, J., concurring); *id.* at 261, 272-273, 279 (O'Connor, J., concurring). In reaching that conclusion, the Court considered whether the employee would have faced the same criticism "if she had been a man," *i.e.*, whether changing her sex would change the outcome. *Id.* at 258; see *id.* at 279 (O'Connor, J., concurring); *id.* at 284 (Kennedy, J., dissenting) ("[S]ex is a cause for the employment decision whether, either by itself or in combination with other factors, it made a difference to the decision.").

Manhart and *Price Waterhouse*—like the text of Title VII itself—resolve the questions presented here. When an employer fires a male employee because his intimate involvement is with a man, but takes no action against women with similar intimate involvements with men, the employer has acted "because of * * * sex." Again, the male employee would not have faced the same outcome if he had been female. Because the employment outcome changes with the employee's sex, the employer's action is "because of * * * sex." Similarly, where an employer

fires male employees because they dress, act, or identify in ways associated with women, but does not take action against women employees who dress or act or identify similarly, the adverse action is plainly "because of * * * sex." If the employees' sex were different, or simply ignored, the action would not have been taken.

D. The Contrary Arguments Seek To Rewrite Title VII's Text

The contrary reading of Title VII departs from its plain meaning. Some have argued that Congress, when it enacted Title VII, would not have imagined it was outlawing discrimination based on sexual orientation. See, *e.g.*, No. 17-1623, Pet. App. 110-112 & n.25 (Lynch, J., dissenting). But Congress enacted a statute—text—with a clear and unmistakable meaning. The judiciary's job is to interpret those words, not to rewrite them to conform to contemporary views of what Congress's preconceptions might have been years before. See, *e.g.*, *Lewis* v. *City of Chicago*, 560 U.S. 205, 215 (2010) ("It is not for [the Court] to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended."); *Pa. Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (congressional intent about how an unambiguous statute would apply "is irrelevant").

This Court has previously rejected efforts to interpose unarticulated exceptions to Title VII's text. For example, in *Oncale* v. *Sundowner Offshore Services, Inc.*, 523 U.S. 75, 77 (1998), the court of appeals had ruled that Title VII does not reach the sexual harassment of a male employee by other men. This Court rejected that result, 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." *Id.* at 79. Even though same-sex harassment

was "assuredly not the principal evil Congress was concerned with when it enacted Title VII," statutory text "often go[es] beyond the principal evil to cover reasonably comparable evils." *Ibid.* And it is "the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Ibid.*

The same flaw, rejected in *Oncale*, dooms any argument based on the fact that Title VII prohibits discrimination because of "sex," but does not expressly prohibit discrimination because of "sexual orientation" or gender status. Saying that the employer took adverse action because of a gay employee's "sexual orientation," for example, is another way of saying the employer acted because the employee is a man who is attracted to another man. The reason the employee's attraction to men is deemed objectionable, and becomes a basis for termination, *is* the employee's own sex—that the employee is a man. If the employee were a woman, the attraction to men would prompt no adverse result. Similarly, saying that an employer took adverse action because of an employee's gender status is another way of saying the employer acted because the employee did not conform to the expectations associated with that employee's sex. In both cases, the action thus is "because of * * * sex" within the meaning of Title VII. It may be that Congress could have enumerated sexual orientation or gender status as a *sub*-category of sex discrimination. But that is beside the point. The discrimination is covered by the existing text; no more is required.

Indeed, Congress did not list discrimination based on "interracial dating" as a specific sub-category of discrimination because of race. But that does not mean that Title VII permits an employer to fire an employee for dating someone of a different race. Such an adverse

action would fall squarely within Title VII's scope as discrimination "because of" race. If the employee's own race were ignored entirely, he would not be fired. See pp. 11-12, *supra*. No court would countenance the argument that such adverse action is "because of interracial dating" and not "because of race." The similar "because of sexual orientation" and not "because of sex" argument should fare no better here.

The contention that the employer is not motivated by the individual's sex fails for another reason. Title VII does not prohibit discrimination "because of *hostility toward or preference for any* race, religion, or sex." Nor does it itemize, in granular detail, each sub-category of prohibited discrimination. Congress prohibited discrimination "because of * * * sex"; if the adverse action would not be taken but for the individual's sex, it falls within Title VII's plain and unmistakable scope.[7]

"In passing Title VII, Congress made the simple but momentous announcement that sex * * * [is] not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239 (plurality opinion); see *id.* at 259 (White, J., concurring); *Griggs*, 401 U.S. at 436 (explaining that Congress made an individual's "race, religion, nationality, and sex * * * irrelevant" with respect to employment decisions). Employment decisions that make the employee's sex the decisive factor—where changing the employee's sex reverses the

---

[7] Indeed, as noted above, p. 9, n.3, *supra*, Congress prohibited even discrimination in which sex is "*a* motivating factor," even if "other factors also motivated" the adverse employment action. 42 U.S.C. § 2000e-2(m) (emphasis added). *A fortiori*, it should apply where the individual's sex is determinative.

outcome—defy the statutory text that makes that "momentous announcement."

II. These Cases Require Fidelity To Clear Statutory Text

The written word matters. It has a special force, whether in law or literature. One of the critical functions of the public education system is to educate students to think critically about the world, law, and government. In our system, a democratically elected Congress makes law by enacting written statutes that exist separate and apart from the individuals who drafted them.

The faithful construction of the statute at issue here—Title VII—is of particular importance to *amici*. NEA and AFT represent the educators and school staff, and NSBA and AASA the school boards and superintendents, that together work in and run the Nation's public schools. Collectively, public school districts are the largest employer in the country. Reading Title VII's clear command as a straightforward rule, devoid of hidden exceptions or vanishingly thin distinctions, provides consistent guidance that can be effectively and efficiently conveyed to and applied by school boards, administrators, educators, and staff alike. Applying Title VII's clear text also ensures that public schools will draw from the broadest pool of talent, regardless of non-merit-based characteristics. Finally, discrimination, harassment, and intimidation are inconsistent with the safe learning environment schools strive to create to allow students to thrive. If teachers and school employees are not protected from discrimination, students may not feel secure either.

A. The Importance of Written Law Pervades Our Culture and System of Government

The existence of written law—and following the law as written—has long been central to Western Civilization. Whether one dates it to ancient Greece,[8] or to Mosaic Law,[9] or earlier, the public's ability to access and comprehend the laws that govern them is an essential feature of the legal systems from which ours evolved. Unwritten law that cannot be known in advance, law too complex to be understood, or law too distant to fathom, has long been viewed as a license for arbitrariness and tyranny.[10]

It was for those reasons that the Framing Generation recognized the need for—and created—written constitutions for the States and federal government alike. See, *e.g.*, *Hurtado* v. *California*, 110 U.S. 516, 531 (1884) ("In

---

[8] A key innovation attributed to the ancient Greeks was making law accessible to the masses. "The Greeks were unique * * * in using writing to make law a popular, communal institution, open to participation by a large segment of the community rather than as a means of imposing autocratic rule on the community." Michael Gagarin, *Writing Greek Law* 224 (2008); see also Frederick W. Dingledy, *From Stele to Silicon: Publication of Statutes, Public Access to the Law, and the Uniform Electronic Legal Material Act*, 111 L. Libr. J. 165, 171 (2019).

[9] Moses—a "lawgiver[ ]" with such significance as to warrant a place in a frieze within the Supreme Court, *Van Orden* v. *Perry*, 545 U.S. 677, 688 (2005) (plurality opinion)—addressed the practical accessibility of the law. The "commandments that are written in this book of the law," Moses explained, are not so "wondrous or remote" as to require divine interpretation, but instead are "very near" for the average person to follow. *Deuteronomy* 30:10-13.

[10] Justice Scalia pointed to "one of emperor Nero's nasty practices" of "post[ing] his edicts high on the columns so that they would be harder to read and easier to transgress." Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1179 (1989).

this country written constitutions were deemed essential to protect the rights and liberties of the people."); G. Edward White, *The Path of American Jurisprudence*, 124 U. Pa. L. Rev. 1212, 1220 (1976).

The very structure the U.S. Constitution establishes for our national government is premised on written law. For example, bicameralism and presentment are predicated on written law. The House and the Senate consider *written* bills and *written* amendments—not intentions or undocumented viewpoints. The bills passed by each of those bodies are presented, as written instruments, to the other for consideration. And the bills enacted by both bodies are presented to the President, as written documents, for signature. See *INS* v. *Chadha*, 462 U.S. 919, 945-951 (1983).

The role of written law is also critical to our system of separated powers. The judiciary's role is "to apply faithfully the law Congress has written," *Henson* v. *Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017), preserving the separation of powers between the democratically accountable branches that make law and the unelected judges who interpret it, see *King* v. *Burwell*, 135 S. Ct. 2480, 2505 (2015) (Scalia, J., dissenting). By constraining themselves to follow clear statutory text, courts ensure the legislative and judicial "branches * * * adhere to [their] respected, and respective, constitutional roles." *Lamie* v. *U.S. Tr.*, 540 U.S. 526, 542 (2004).

That limitation on the judiciary reflects part of the American historical experience. The Puritans who first settled New England had objected that English legal texts were "obscure" and "could not in fact constrain judicial interpretation." H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 Harv. L. Rev. 885,

891 (1985). To them, this "obscur[ity]" gave rise to the mischief of judges using "the elaborate interpretive techniques of the common law * * * to justify * * * imposition of their personal views." *Ibid.*[11] The Puritans' views were "absorbed into an ideology * * * that served as an important intellectual foundation for both the American revolutionaries * * * and the Jeffersonian Republicans of the 1790s." *Ibid.*[12] The Founding Generation likewise absorbed the reverence for text from influential political philosophers like Montesquieu. He observed: "In despotic governments * * * the judge himself is his own rule. * * * In republics, *the very nature of the constitution requires the judges to follow the letter of the law*." 1 Baron de Montesquieu, *The Spirit of Laws* 109 (5th ed., Thomas Nugent trans., 1773) (1748) (emphasis added). It thus should come as no surprise that Chief Justice Marshall would later observe that "a law is the

---

[11] The history of statutory interpretation in England—to which the Puritans were reacting—is mixed. Eventually, English jurists, too, began placing greater emphasis on statutory text as the "complete expression[ ] of legislative policy." John F. Manning, *Textualism and the Equity of the Statute*, 101 Colum. L. Rev. 1, 53-56 (2001).

[12] See also Powell, *supra*, at 891 (describing a "prominent" Puritan lawyer who "advocated a kind of codification that would make the law [clear] * * * and would require judges * * * to follow the code's wording * * * as 'the settled law'"). The Puritans' insistence on textual law may reflect views asserted in the Protestant Reformation. During the Reformation, "[o]ne of [the reformers'] central themes * * * was summed up in the * * * slogan, '*sola Scriptura*' (Scripture only)." *Id.* at 889 (quoting R. Brown, *The Spirit of Protestantism* 67 (1965)). This was especially true in the case of British Protestants. *Ibid.* Text was supreme: "Any exposition of the text that went beyond the text was, of necessity, a 'human invention.'" *Ibid.* (quoting John Selden, *Table-Talk: Being the Discourses of John Selden Esq.* 25 (1699)).

best expositor of itself." *Pennington* v. *Coxe*, 6 U.S. (2 Cranch) 33, 52 (1804).

Here, Title VII's text yields a clear result: If the adverse action would not have occurred but for the employee's sex—where changing or ignoring the employee's sex would change the outcome—there is discrimination "because of * * * sex" within the meaning of Title VII. Any protest that Congress could not have or would not have imagined Title VII's protections extending that far is no answer at all. See, *e.g.*, No. 17-1623, Pet. App. 110-112 & n.25 (Lynch., J., dissenting). Title VII is a statute composed of words with established, independent meaning. It is not limited by "the prejudices and popular movements animating national politics at the time the statute was enacted." *Id.* at 22 n.8 (majority opinion).

Perhaps legislators believed that Title VII would not reach discrimination based on sexual orientation; perhaps they believed it would; or perhaps they did not consider it at all. But the text they enacted reaches it. Text—and law—can express fundamental rules and principles that transcend the limited vision or imaginations of individual drafters. See Roland Barthes, *The Death of the Author*, *in The Rustle of Language* 49, 50 (Richard Howard trans., 1986) ("[I]t is the language which speaks, not the author."). Consequently, in cases like this one, the Court should embrace the result the text provides. See *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1631 (2018) (Once Congress enacts a statute, "'[the Court] do[es] not inquire what the legislature meant; [the Court] ask[s] only what the statute means.'" (quoting *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 396-397 (1951) (Jackson, J., concurring))); see also *Lamie*, 540 U.S. at 542 ("If Congress enacted into law something

different from what it intended, then it should amend the statute to conform to its intent.").[13]

B. Following Title VII's Plain Text Serves the Critical Interest of Providing Clear, Administrable Rules That *Amici* Can Teach and Apply

Here, Title VII's clear command yields a workable set of rules. Statutes "are meant to be understood and lived by." *Wis. Cent. Ltd.* v. *United States*, 138 S. Ct. 2067, 2074 (2018). *Amici* are keenly affected by such considerations. *Amici* represent both employees protected by Title VII and school management with a powerful interest in being able to ensure compliance. Employees must understand the scope of their rights. And management must be able to train administrators to follow employment rules and regulations like Title VII. *Amici* thus need clear, administrable rules to order their conduct, allowing school districts and employees to focus their resources and time on their educational mission.

---

[13] Equally irrelevant is inaction in amending Title VII to include the term "sexual orientation." Congress's failure to amend a statute "deserve[s] little weight in the interpretive process." *Cent. Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 187 (1994). That is because inaction could mean many things: "approval of the status quo," "inability to agree upon how to alter the status quo," "unawareness of the status quo," "indifference to the status quo," or "political cowardice." *Johnson* v. *Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting). "Arguments based on subsequent legislative history * * * should not be taken seriously, not even in a footnote." *Sullivan* v. *Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring); see also *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 650 (1990) (noting "subsequent legislative history is 'a hazardous basis for inferring the intent of an earlier' Congress" and emphasizing that a subsequent "proposal that does not become law" "is a particularly dangerous ground on which to rest an interpretation of a prior statute").

Adherence to Title VII's text reduces complexity of application and helps produce predictable results. An employer contemplating some sort of action must at least ask whether it might have treated an employee differently if the employee's sex were different (or if the employer did not consider sex at all). See pp. 8-9, *supra*. If the answer is "yes," the employer must think again.

The contrary view, by contrast, threatens to import difficult-to-fathom distinctions and complicated analysis that may evade straightforward application—as well as unpredictable results. It also invites "[c]limbing * * * levels of abstraction * * * to disregard text." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 19 (2012). For example, the *text* asks employers and courts to consider whether changing the individual's sex, or refusing it consideration, alters the calculus. But asking the question more abstractly creates uncertain outcomes. Employers would be asked to distinguish adverse action based on sex or non-conformity with sex-based expectations, on the one hand, from actions based on the employee's sexual orientation or gender status on the other.

Consider, for example, *Price Waterhouse*. In that case, Ms. Hopkins alleged she was denied a promotion because of her failure to act "femininely, wear make-up, have her hair styled, and wear jewelry." 490 U.S. at 235 (plurality opinion). The Court concluded that Ms. Hopkins' claim, as alleged, stated a claim for discrimination "because of" sex under Title VII. *Id.* at 250; *id.* at 258-259 (White, J., concurring); *id.* at 272-273, 279 (O'Connor, J., concurring). Applying statutory text directly makes that a relatively straightforward case: The adverse action is "because of" sex so long as the employer would have judged Ms. Hopkins differently—if

it would not have acted based on her failure to conduct herself "femininely"—had she been male.

The contrary position pressed by the party employers here, however, makes even *Price Waterhouse* nearly impossible to decide. The question ceases to be whether Ms. Hopkins would have been treated differently if one imagines she were male (or ignores sex entirely). Instead, one might also be required to ask *why* the employer acted on the basis of Ms. Hopkins' lack of "femininity." In particular, courts would ask whether the employer deemed those characteristics relevant because of gender expectations for women that were not applied to men (which would be prohibited). But they would also ask whether Ms. Hopkins' behavior and appearance was considered because it led the employer to believe she might be gay (which would be a permissible basis for adverse action).[14]

That line, between discriminating against a woman for seeming masculine, and discriminating against a woman for seeming masculine because it might suggest she is

---

[14] Similar line-drawing and abstractions would arise in the context of sexual harassment, complicating cases like *Oncale*. In *Oncale*, the employee alleged male co-workers "physically assaulted him in a sexual manner" and "threatened him with rape." 523 U.S. at 77. Those threats led him to quit his job. *Ibid.* This Court concluded that the alleged sexual harassment would violate Title VII's prohibition on discrimination "because of * * * sex," even though those actions were taken by other men. See *id.* at 79-80. Adopting the view of the party employers here would create the unworkable situation in which Title VII either would not protect gay employees against sexual harassment imposed on them for being gay, or gay employees would be protected from same-sex sexual harassment but could be fired for being gay. Neither result has any basis in the text of Title VII.

attracted to other women, is almost impossible to draw. See *Hamm* v. *Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1067 (7th Cir. 2003) (Posner, J., concurring) ("Hostility to effeminate men and to homosexual men, or to masculine women and to lesbians, will often be indistinguishable as a practical matter."). It is almost entirely circular: Even if the employer asserts it was concerned about the employee's sexual orientation, that does not exclude the discrimination from being "because of * * * sex." Hostility to gay employees may simply reflect the view that they will not conform to gender expectations (of femininity in the case of women or masculinity for men).

To make matters more complex, if the employer-parties' view were accepted, Title VII would not even require the employer's presumption about sexual orientation to be correct. If the employer acted on the basis of *perceived* sexual orientation, its action would fall outside Title VII. Thus, an employer *could not* fire a male employee for being effeminate, but it *could* fire him if his effeminate mannerisms led the employer to mistakenly conclude that he was gay.

Such atextual, hard-to-apply, level-of-generality-dependent inquiries are matters of serious concern to *amici*, and to NSBA and AASA in particular. NSBA represents school boards across the country as well as their more than 90,000 members. AASA represents over 13,000 school superintendents, system leaders, and education advocates. One of NSBA's and AASA's missions is to provide guidance to their members regarding the proper application of Title VII. Those organizations cannot provide effective and meaningful guidance to a membership that includes tens of thousands of non-lawyers if Title VII's application is laden with non-textual exceptions and level-of-abstraction-

based distinctions. By contrast, *amici* can easily administer, understand, and instruct others on Title VII's "because of * * * sex" prohibition if its plain terms are followed. Would the outcome or calculus be different had the employee been of another sex—and is the employee's sex being considered at all? Those are questions that can be readily understood, applied, and taught.

C. Title VII's Merit-Focused Mandate Is Critical to Recruiting and Retaining Quality Educators Indispensable to the Mission of Public Education

Title VII's text reflects a "simple but momentous" determination—that certain characteristics, such as sex, race, religion, and national origin are "not relevant to the selection, evaluation, or compensation of employees." *Price Waterhouse*, 490 U.S. at 239 (plurality opinion); see *Griggs*, 401 U.S. at 436. Instead, Title VII "drive[s] employers to focus on qualifications rather than on race, religion, sex, or national origin." *Price Waterhouse*, 490 U.S. at 243 (plurality opinion). The "controlling factor" in employment decisions should be merit. *Griggs*, 401 U.S. at 436.

Ensuring that merit matters is critical to the success of American education, as "teachers play a critical part in developing students' attitude toward government and understanding of the role citizens play in our society." *Ambach* v. *Norwick*, 441 U.S. 68, 78 (1979). *Amici* share a common, unflinching interest in recruiting, retaining, and developing the best workforce possible, regardless of non-merit-based characteristics. An expansive and inclu-

sive workforce leads to more successful outcomes for students and employees alike.[15]

But *amici* face a major impediment to that mission—a critical shortage of qualified teachers across the country. See Tim Walker, *Teacher Shortage Is 'Real and Growing, and Worse Than We Thought*,' neaToday (Apr. 3, 2019), http://neatoday.org/2019/04/03/how-bad-is-the-teacher-shortage/; Mokoto Rich, *Teacher Shortages Spur a Nationwide Hiring Scramble (Credentials Optional)*, N.Y. Times (Aug. 9, 2015), https://nyti.ms/1WaaV7a. It is imperative that *amici* recruit and retain qualified teachers from the broadest talent pool—and that laws favor employee retention by limiting discrimination or harassment based on characteristics divorced from merit. Title VII, applied according to its plain text, provides clear direction on how to identify and retain qualified teachers, while maintaining an effective and safe learning environment: Focus on qualifications, not race, religion, sex, or failure to fulfill racial, religious, or sex-based expectations. That focus ensures that students learn in the best possible environment, from the most qualified educators.

One of the central missions of our schools, moreover, is to "'prepar[e] pupils for citizenship in the Republic.'" *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986). Beyond giving students access to the best qualified teachers and staff, schools "'must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the prac-

---

[15] See Stephen Brand et al., *Middle School Improvement and Reform: Development and Validation of a School-Level Assessment of Climate, Cultural Pluralism, and School Safety*, 95 J. Educ. Psych. 570, 571 (2003) (discussing association between academic achievement and exposure to differing backgrounds).

tice of self-government in the community and the nation.'" *Ibid.* Discrimination and intolerance are antithetical to that pedagogical goal. See *ibid.*

Following Title VII's plain text to eliminate irrelevant characteristics from school employment decisions also promotes a school environment conducive to teaching and learning. School climate—the "product of the interpersonal relationships among students, families, teachers, support staff, and administrators"—is a key predictor of student health and academic success. Lindsey O'Brennan & Catherine Bradshaw, Nat'l Educ. Ass'n, *Research Brief: Importance of School Climate*, *in NEA Bully Free School Climate Summit: Conference Proceedings* app. A, at 1 (2014), https://www.nea.org/assets/docs/14746_Bully_Free_School_Climate_Summit_Book.pdf; see also Amrit Thapa et al., Nat'l Sch. Climate Ctr., *School Climate Research Summary: August 2012* 2-4 (2012), https://www.schoolclimate.org/storage/app/media/PDF/sc-brief-v3.pdf.

An inclusive school climate fosters *all* students' sense of safety and academic success. See Brand et al., *supra*, at 570-571; O'Brennan & Bradshaw, *supra*, at 3-4. In contrast, a negative school climate—one that permits discrimination—harms students, both in terms of their health and academic achievement. See Joseph G. Kosciw et al., *The 2017 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation's Schools* xx-xxi (2017), https://files.eric.ed.gov/fulltext/ED590243.pdf; Thapa et al., *supra*, at 4-5. Protecting educators from discrimination according to Title VII's plain text helps create a powerful and effective educational workforce, and school environment, that benefits the education of all students.

CONCLUSION

The judgment of the Second and Sixth Circuits should be affirmed, and the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

ALICE O'BRIEN
ERIC A. HARRINGTON
NATIONAL EDUCATION ASSOCIATION
1201 16th St., N.W.
Washington, D.C. 20036
(202) 822-7018

DAVID STROM
AMERICAN FEDERATION OF TEACHERS
555 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 393-7472

FRANCISCO M. NEGRÓN, JR.
SONJA TRAINOR
NATIONAL SCHOOL BOARDS ASSOCIATION
1680 Duke St., Fl. 2
Alexandria, VA 22314
(703) 838-6722

JEFFREY A. LAMKEN
Counsel of Record
MOLOLAMKEN LLP
The Watergate, Suite 660
600 New Hampshire Ave., N.W.
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

GERALD P. MEYER
JORDAN A. RICE
MOLOLAMKEN LLP
300 N. LaSalle St.
Chicago, IL 60654
(312) 450-6700

W. ALEX HARRIS
MOLOLAMKEN LLP
430 Park Ave.
New York, NY 10022
(212) 607-8160

Counsel for Amici Curiae

JULY 2019