INTRODUCTION
Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating “because of sex.” The Supreme Court interpreted this phrase to also prohibit employers from discriminating based on sex stereotypes. This case tests whether discrimination based on sexual orientation violates Title VII’s prohibition on discrimination “because of sex,” and whether it violates the ban on sex stereotyping.

ISSUE
Does discrimination against an employee because of the employee’s sexual orientation violate the prohibition on employment discrimination “because of sex” in Title VII of the Civil Rights Act of 1964?

FACTS
In each of these consolidated cases, the employer fired the employee because of the employee’s sexual orientation. In each case, the employee sued, arguing that the action violated the prohibition against discrimination “because of sex” in Title VII of the Civil Rights Act of 1964.

The first case arose when Clayton County, Georgia, fired Gerald Lynn Bostock because he is gay. Bostock served for over ten years beginning in 2003 as an advocate for at-risk children in the Clayton County juvenile court system. During that time, he served as the county’s child welfare services coordinator, and he held primary responsibility for the Court Appointed Special Advocates program (CASA). (Under Georgia law, CASA volunteers advocate for the best interests of the child during juvenile court dependency proceedings. Some jurisdictions call such volunteers guardians ad litem, or GALs.) Bostock received favorable performance reviews for his work, and under his leadership the CASA program received the Program of Excellence Award from Georgia CASA.

In January 2013, Bostock began to participate in a gay recreational softball league. Bostock promoted participation in the CASA program among league participants. In the months that followed, Bostock’s sexual orientation and his participation in the softball league drew criticism “by one or more individuals with significant influence in the County’s decisionmaking.” In particular, “[i]n May, his sexual orientation and participation in the softball league were the subject of disparaging comments at a meeting of the Friends of Clayton County CASA Advisory Board.

On June 3, 2013, Bostock was fired. Although the County initially (and falsely) claimed that Bostock mismanaged CASA funds, it later stated that the reason for his termination was “conduct unbecoming of a county employee.”

Bostock sued, arguing that his termination violated Title VII’s prohibition on discrimination “because of sex.” The district court ruled in favor of the county, and the Eleventh Circuit affirmed.

The second case arose when Altitude Express, a recreational skydiving outfit in Long Island, New York, fired Donald Zarda because he is gay. Zarda worked for Altitude Express as a
Moreover, they contend that sexual orientation discrimination is a sex-based classification within the meaning of Title VII, and that such discrimination was one motivating factor, even if the employer had other, legitimate reasons for its decision. 42 U.S.C. § 2000e-2(m). They also contend that creating an exception under Title VII for sexual orientation would force courts to engage in a futile and incoherent effort to distinguish between claims involving sexual orientation and claims involving appropriate sex presentation and sex roles.

According to the plaintiffs, this would undermine anti-sex-discrimination protections for all workers. (For one, this reading could encourage employers to argue that their otherwise unlawful discrimination was in fact lawful, because it was based on sexual orientation, or perceived sexual orientation, and not sex.)

The defendants counter that “the original public meaning” of Title VII only prohibits employers from treating one sex better or worse than the other, and that it says nothing about sexual orientation discrimination. They claim that the public “has always understood sex discrimination and sexual-orientation discrimination as distinct concepts,” and that numerous statutes, executive actions, and judicial rulings confirm this understanding. Moreover, they contend that the plaintiffs’ reading, which shoehorns sexual orientation discrimination into sex discrimination, runs counter to the plain text of Title VII. In particular, they contend that sexual orientation discrimination is based on generalizations about the way a person of a particular sex should behave, that is, that men should be attracted to women and vice versa.

The plaintiffs argue next that the statutory history suggests that Title VII bans discrimination by sexual orientation. They claim that Congress, in enacting the Pregnancy Discrimination Act of 1978, “unequivocally mandated a broad classification-based application of the ban on sex discrimination.” They contend that Congress ratified this broad reading and incorporated it into Title VII when it enacted the Civil Rights Act of 1991. And they claim that the Court recognized that Title VII applied broadly when it ruled in Oncale v. Sundowner Offshore Services, Inc., 523 U.S. 75 (1998), that Title VII barred discrimination “because of sex” and “reasonably comparable evils,” including same-sex sexual harassment. The plaintiffs contend that older cases to the contrary—those decided before Price Waterhouse, Oncale, and the Civil Rights Act of 1991—have been undermined to the point of abrogation by these developments in the law. More generally, based on the plain text and history, they assert that Title VII’s ban on discrimination “because of sex” sweeps more broadly than Congress may have intended in 1964—a fact that the Court has recognized time and again.

Finally, the plaintiffs argue that their reading of Title VII is consistent with, and harmonizes, the rest of the statute. In particular, they claim that Title VII’s prohibition on discrimination “because of sex” must include sexual orientation discrimination, because sexual orientation is necessarily defined at least in part by sex, and because otherwise it would conflict with the Civil Rights Act of 1991. That Act provides that an employee can establish sex discrimination by showing that sex discrimination was one motivating factor, even if the employer had other, legitimate reasons for its decision. 42 U.S.C. § 2000e-2(m). They also contend that their reading would harmonize the conflicting lower court decisions with similar facts, but very different outcomes. They say that creating an exception under Title VII for sexual orientation would force courts to engage in a futile and incoherent effort to distinguish between claims involving sexual orientation and claims involving appropriate sex presentation and sex roles.

According to the plaintiffs, this would undermine anti-sex-discrimination protections for all workers. (For one, this reading could encourage employers to argue that their otherwise unlawful discrimination was in fact lawful, because it was based on sexual orientation, or perceived sexual orientation, and not sex.)

The defendants counter that “the original public meaning” of Title VII only prohibits employers from treating one sex better or worse than the other, and that it says nothing about sexual orientation discrimination. They claim that the public “has always understood sex discrimination and sexual-orientation discrimination as distinct concepts,” and that numerous statutes, executive actions, and judicial rulings confirm this understanding. Moreover, they contend that the plaintiffs’ reading, which shoehorns sexual orientation discrimination into sex discrimination, runs counter to the plain text of Title VII.
to the statutory construction canon that Congress does not make significant changes in a cryptic fashion. They assert that when Congress amended Title VII in the Civil Rights Act of 1991, “it adopted the uniform judicial and regulatory consensus then prevailing—that Title VII does not include sexual orientation.”

The defendants argue next that the plaintiffs’ arguments fail. They claim that the plaintiffs’ textual arguments fail because the Court has rejected the plaintiffs’ preferred “functional approach” in a similar context. Moreover, they contend that the plaintiffs wrongly compare their treatment of a gay man to their treatment of a straight woman in arguing that Title VII covers sexual orientation discrimination. Instead, they assert that the Court should compare their treatment of a gay man to their treatment of a lesbian woman. Because they would treat the two the same (by firing them both), there is no sex discrimination. (In this way, the defendants say that the plaintiffs’ “but for” test rigs the result in the plaintiffs’ favor, and therefore cannot be the right way to read the statute.)

The defendants argue that the plaintiffs’ sex-stereotyping claims also fail. They say that Price Waterhouse did not recognize a free-roaming sex-stereotyping claim (based on a stereotype that members of one sex should be attracted to members of the other sex, as here); instead, it recognized a sex-specific stereotyping claim (based on a stereotype that women should not be aggressive). They contend that under Price Waterhouse the plaintiffs have to use evidence of sex-specific stereotyping (which they did not use), and that the plaintiffs have to show that one sex was treated better than the other (which they could not show).

The defendants contend that the plaintiffs’ claim based on associational discrimination also fails. They say that the plaintiffs wrongly analogize sexual orientation discrimination to a ban on interracial marriage. But they claim that this analogy does not work, because sexual orientation discrimination does not disadvantage or favor one sex over the other.

Finally, the defendants argue that the plaintiffs’ reading of Title VII would result in intolerable consequences. They say that the plaintiffs’ reading would “mandate a sex-blind workplace,” because it would remove every distinction based on sex, including separate-sex restrooms, locker-rooms, fitness tests, and dress codes. They claim that the plaintiffs’ reading would also “imperil religious freedom” by threatening the practices of faith-based organizations. They argue that if Title VII is to cover sexual orientation discrimination, Congress, not the Court, should make the change—something that Congress has repeatedly declined to do.

**SIGNIFICANCE**

These cases and their companion, *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, test the reach of Title VII’s ban on discrimination “because of sex,” and whether that ban extends to discrimination on the basis of transgender status and sexual orientation. While the cases have some technical differences, they have very similar implications.

Most obviously, these cases matter deeply to the estimated 11.3 million LGBTQ adults in the United States. According to 21 states and the District of Columbia as amici, employment discrimination against LGBTQ individuals runs rampant. Forty-two percent of gay, lesbian, and bisexual individuals have faced employment discrimination based on their sexual orientation; ninety percent of transgender individuals have experienced harassment or mistreatment in the workplace; gay and bisexual men earn eleven to sixteen percent less than similarly qualified heterosexual men; and the unemployment rate for transgender individuals is three times the national average.

But at the same time, only 21 states and the District of Columbia expressly ban discrimination on the basis of sexual orientation and gender identity by statute or regulation. A few others provide some form of protection by way of agency interpretation or court ruling. That means that LGBTQ individuals lack protection against employment discrimination in about one-half of the states. These individuals’ only protection is Title VII. If the Court declines to read Title VII to protect LGBTQ individuals, their only protection against employment discrimination will go away.

On the other hand, the employers, the government, and their amici argue that the plaintiffs’ reading of Title VII would so “expand” the concept of “sex” that employers would not know how to comply, and courts would not know how to enforce it. Moreover, the defendants and their amici argue that the plaintiffs’ reading of Title VII could mean the end of things like sex-specific restrooms and locker-rooms, and this could actually undermine Title VII by threatening other sex-specific practices and institutions that are designed to provide an equal playing field between men and women.

There are a couple things to watch. First, by relying on sex-stereotyping claims, the plaintiffs in these cases give the Court a way to rule in their favor without necessarily reading “sex” to include sexual orientation or transgender status. But it’s not clear that this approach will attract any justice who isn’t already inclined to read “sex” that way and thus rule in favor of the plaintiffs. More bluntly, it’s not clear that this approach will attract any of the traditional conservatives on the Court.

Next, in response to the plaintiffs’ sex-stereotyping claims, the employers and the government rely heavily on an “original understanding” argument—that Title VII’s ban on discrimination “because of sex” was originally understood to ban only discrimination that disadvantages a person of one sex as compared to a similarly situated person of the opposite sex. This argument is designed to undermine the plaintiffs’ sex-stereotyping claims, which are based on Court interpretations of Title VII long after the statute was originally enacted. But it’s not clear that the employers’ original understanding arguments will attract any justice who isn’t already inclined to read Title VII to include a ban on sex-stereotyping. More bluntly, it’s not clear that this approach will attract any traditional progressives on the Court.

If all this is right, we can expect that most or all of the justices will come to these cases already leaning (probably heavily) one way or the other. And when the decisions come out, we can expect a sharply—and ideologically—divided Court.
Steven D. Schwinn is a professor of law at the University of Illinois Chicago John Marshall Law School and coeditor of the Constitutional Law Prof Blog. He specializes in constitutional law and human rights. He can be reached at sschwinn@jmls.edu or 312.386.2865.


ATTORNEYS FOR THE PARTIES

For Petitioner Gerald Lynn Bostock (Brian John Sutherland, 404.781.1100)

For Petitioner Altitude Express, Inc. (Saul D. Zabell, 631.589.7242)

For Respondent Melissa Zarda (Gregory Antolino, 212.334.7398)

For Respondent Clayton County, Georgia (Jack R. Hancock, 470.322.1802)

AMICUS BRIEFS

In Support of Employees—Gerald Lynn Bostock and Melissa Zarda
206 Businesses (Todd Steven Anten, 212.849.7000)

Altria Group, Inc. (Lauren Rosenblum Goldman, 212.506.2500)

American Bar Association (Robert M. Carlson, 312.988.5000)

American Federation of Labor and Congress of Industrial Organizations (Matthew James Ginsburg, 202.637.5397)

American Medical Association (Scott Block Wilkens, 202.719.7000)

American Psychological Association (Jessica Ring Amunson, 202.639.6023)

Anti-Discrimination Scholars (Mitchell Pearsall Reich, 202.637.5833)

Business Organizations (Lisa Schiavo Blatt, 202.679.5257)

Corpus-Linguistics Scholars Professors Brian Slocum (Andrew Rhys Davies, 212.610.6300)

Employment Discrimination Law Scholars (Sasha Minh Samberg-Champion, 202.728.1888)

Former Executive Branch Officials and Leaders (Evan Wolfson, 212.768.6700)

Georgia Equality (Emmet J Bondurant II, 404.421.0837)

GLBTQ Legal Advocates & Defenders, National Center for Lesbian Rights (Alan Evan Schoenfeld, 212.937.7294)

Historians (Chanakya Arjun Sethi, 929.264.7758)

Illinois, New York, et al. (Barbara Dale Underwood, 212.416.8016)

Impact Fund, et al. (Lindsay Polastri Nako, 510.845.3473)

Interact: Advocates for Intersex Youth (Jonah Moses Knobler, 212.336.2134)

Karl Olson (Janine Marilyn Brookner, 202.338.0851)

Kenneth B. Mehlman (Roy T. Englert Jr., 202.775.4503)

Lambda Legal Defense and Education Fund, Inc. (Gregory R. Nevins, 404.897.1880)

Lawyers’ Committee for Civil Rights Under Law, the Leadership Conference on Civil and Human Rights, and 57 Civil Rights Organizations (Daniel Adam Rubens, 212.506.3679)

Legal Aid Society (Brian Timothy Burgess, 202.346.4000)

Lesbian, Gay, Bisexual, Transgender, and Queer (LGBTQ+) Members of the Legal Profession and Law Students (Margaret A. Costello, 313.596.9854)

Local Governments and Mayors (Danielle Luce Goldstein, 213.978.8100)

Members of Congress (Peter T. Barbur, 212.474-1000)

Modern Military Association of America and Transgender American Veterans Association (James Leon Moore III, 202.371.7337)

Muslim Bar Association of New York (Adeel Abdullah Mangi, 212.336.2000)

National Education Association, American Federation of Teachers, National School Board Association, and AASA, the School Superintendents Association (Jeffrey Alan Lamken, 202.556.2010)

National LGBT Bar Association (Sanford Jay Rosen, 415.433.6830)

National Women’s Law Center (Erica Courtney Lai, 202.851.2073)

Philosophy Professors (Lisa Hogan, 303.223.1100)

Presiding Bishop and President of the House of Deputies of the Episcopal Church (Jeffrey S. Trachtman, 212.715.9175)

Scholars Who Study the LGB Population (Jeffrey T. Green, 202.736.8291)

Service Employees International Union (Barbara Jane Chisholm, 415.421.7151)

Southern Poverty Law Center (Melissa Arbus Sherry, 202.637.3386)

Statutory Interpretation and Equality Law Scholars (Brianne Jenna Gorod, 202.296.6889)
Trevor Project, PFLAG, and Family Equality (Douglas Charles Dreier, 202.719.4988)

Walter Dellinger (Joshua Adam Matz, 212.763.0883)

Wisconsin Advocacy Organizations (Jeffrey Allen McIntyre, 608.255.4440)

William N. Eskridge Jr. and Andrew M. Koppelman (William N. Eskridge Jr., 203.432.4992)

Willaeta Burlette Carter (W. Burlette Carter, 202.994.5155)

Women CEOs and Other C-Suite Executives (Suzanne Beth Goldberg, 212.854.0411)

Women’s and Children’s Advocacy Project, Equal Means Equal, and Allies Reaching for Equality (Wendy J. Murphy, 617.422.7410)

In Support of Employers—Altitude Express, Inc. and Clayton County, Georgia

Advocates for Faith and Freedom (C. Thomas Ludden, 248.593.5000)

American Public Philosophy Institute (David Robert Upham, 972.721.5186)

Billy Graham Evangelistic Association, et al. (Frederick W. Claybrook Jr., 202.250.3883)

Council of Christian Colleges & Universities, et al. (Richard Shawn Gunnarson, 801.323.5907)

David A. Robinson (David Alan Robinson, 203.214.4078)

Defend My Privacy, et al. (Joel Aaron Ready, 610.926.7875)

First Liberty Institute (Kelly J. Shackelford, 972.941.4444)

Foundation for Moral Law (John Allen Eidsmoe, 334.324.1812)

H.T. Hackney Co. (Edward Howard Trent, 865.546.1000)

Institute for Faith and Family and Christian Family Coalition (Deborah Dewart, 910.326.4554)

Liberty Counsel (Mathew D. Staver, 407.875.1776)

National Organization for Marriage and Center for Constitutional Jurisprudence (John C. Eastman, 877.855.3330)

Marriage Law Foundation (William C. Duncan, 801.367.4570)

Muslim American Leaders (Talib Ibn Karim, 202.256.0499)

National Association of Evangelicals, et al. (Alexander Dushku, 801.328.3600)

New Civil Liberties Alliance (Jonathan F. Mitchell, 512.686.3940)

Public Advocate of the United States, et al. (William Jeffrey Olson, 703.356.5070)

Religious Freedom Institute’s Islam & Religious Freedom Action Team and Islamic Scholars (Michael K. Whitehead, 816.398.8967)

Ryan T. Anderson (Charles S. LiMandri, 858.759.9948)

Tennessee (Andree Kahn Blumstein, 615.741.3492)

United States (Noel J. Francisco, Solicitor General, 202.514.2217)