TEXTUALISM AND TITLE VII

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I. INTRODUCTION

Bostock v. Clayton County[1] presents the question whether discharging an employee for being homosexual discriminates against him because of his sex under Title VII of the Civil Rights Act of 1964.[2]

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1. Bostock v. Clayton Cty. Bd. of Comm'rs, 723 F. App'x 964 (11th Cir. 2018), *cert. granted sub nom.* Bostock v. Clayton Cty., 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 17-1618).

2. 42 U.S.C. § 2000e-2(a)(1) (2018). This Article assumes *arguendo* the ground for discharge in the question presented, which Clayton County disputes. *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari at 9, Bostock v. Clayton Cty., 139 S. Ct. 1599 (Aug. 10, 2018) (No. 17-1618). *Bostock* was argued together with two other cases raising similar issues. Altitude Express, Inc. v. Zarda, 883 F.3d 100 (2d Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22, 2019) (No. 17-623); R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 884 F.3d 560 (6th Cir. 2018), *cert. granted*, 139 S. Ct. 1599 (U.S. Apr. 22,

Bostock's supporters herald the case as the ultimate test of faithfulness to the interpretive theory of textualism.[3] After all, "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'"[4] The County, on the other hand, argues that Bostock's interpretation rewrites the statute.[5]

It is debatable whether textualism can generate historically-determined, non-normative legal interpretations.[6] Nevertheless, the text of Title VII supports the claim that such discrimination is because of Bostock's sex. The Supreme Court can only rule against him by relying on a variety of controversial arguments from text, context, purpose, legislative history, legislative intent and expectations, canons of construction, and more—in a word, pluralism.

This Article summarizes textual grounds for Bostock's claim and landmark judicial decisions consistent with those grounds. It examines early case law holding that adverse employment decisions based on the relative sex of an employee and another person discriminate because of the employee's sex and characterizing defenses like Clayton County's as akin to the doctrine of *Plessy v. Ferguson*,[7] which has no place in sex discrimination law. It connects those cases to the Supreme Court's decision in *Dothard v. Rawlinson*[8] and utilizes previously overlooked briefing and oral argument from that case to show that *Rawlinson* controls *Bostock*. The Article then critiques contrary authorities and the County's defenses. It concludes that the Supreme Court should reaffirm its own precedents that support Bostock's claim, rule that discharging employees because of their sexual orientation discriminates against them because of their sex, and leave the balancing of competing individual and governmental interests to congressional legislation or further development by lower courts.

II. TITLE VII TEXT

Title VII generally forbids an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of

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2019) (No. 18-107). Given the many parties in the three cases, this article focuses on *Bostock* for ease of reference. The analysis applies similarly to the other cases.

3. *See, e.g.*, Richard Primus, *The Supreme Court Case Testing the Limits of Gorsuch's Textualism*, POLITICO (Oct. 15, 2019), https://www.politico.com/magazine/story/2019/10/15/lgbt-discrimination-supreme-court-gorsuch-textualism-229850.

4. Hively v. Ivy Tech Cmty. Coll., 853 F.3d 339, 350–52 (7th Cir. 2017) (en banc) (holding that sexual orientation discrimination is because of the employee's sex under Title VII).

5. *See* Brief for Respondent at 6, Bostock v. Clayton Cty., 139 S. Ct. 1599 (Aug. 16, 2019) (No. 17-1618).

6. *See, e.g.*, *infra* note 155 and accompanying text (statement of Ben Franklin).

7. 163 U.S. 537 (1896).

8. 433 U.S. 321 (1977).

employment, because of such individual's race, color, religion, sex, or national origin"[9] or to "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 race, color, religion, sex, or national origin,"[10] except "where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise."[11]

Title VII applies to classifications, not classes. It protects individuals, not genders.[12] It protects each individual from discharge or discrimination because of such individual's sex. "There is no room to read 'discharge . . . or otherwise discriminate against any individual' to mean 'discharge or otherwise discriminate against a class of people.'"[13]

The text literally requires Bostock to show only that he was discharged because of his sex.[14] He need not prove discrimination, and there is no evidence that he lacked any bona fide occupational qualification ("BFOQ"). Nevertheless, it may be possible to read "discharge . . . or otherwise to discriminate" to implicitly require a showing of discrimination.

III. DISCRIMINATE AGAINST BECAUSE OF SEX

A. Dictionary Definitions

The Oxford English Dictionary defines "discriminate" to include "To make or recognize a distinction; to distinguish among or between; to exercise discernment,"[15] and "To treat a person or group in an unjust or prejudicial manner, esp. on the grounds of race, gender, sexual orientation, etc.; frequently with *against*."[16] Clayton County made a distinction, firing Bostock but not similarly qualified employees. The County treated Bostock in an unjust manner, discharging him without regard to any business requirement or occupational qualification. The County therefore discriminated against him.

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9. 42 U.S.C. § 2000e-2(a)(1) (2018).
10. *Id.* § 2000e-2(a)(2).
11. *Id.* § 2000e-2(e)(1).
12. *See, e.g.*, Brief of Kenneth B. Mehlman et al. as *Amici Curiae* in Support of the Employees at 3, Bostock v. Clayton Cty., 139 S. Ct. 1599 (July 3, 2019) (No. 17-1618).
13. *Id.* at 18.
14. *See* Brief of Lambda Legal Defense and Education Fund, Inc. as *Amicus Curiae* in Support of Employees at 11, Bostock v. Clayton Cty., 139 S. Ct. 1599 (July 3, 2019) (No. 17-1618).
15. *Discriminate,* v., OXFORD ENGLISH DICTIONARY (3d ed. 2013) (referencing definition 2(b) (including usage pre- and post-dating 1964).
16. *Id.* (referencing definition 4, including usage pre- and post-dating 1964).

The Oxford English Dictionary defines "because" when it is "Followed by *of* and a substantive" to mean "By reason *of*, on account *of*."[17] The dictionary's examples show that the definition refers to causation, such as "'Tis a particular Art to load them [*sc.* camels] **because of** the bunch on their backs."'[18]

The dictionary includes two additional definitions that do not apply because they were obsolete at the enactment of Title VII: "For the sake *of*, for the purpose *of*,"[19] and "For the sake *of* not; for fear of."[20] The definition of "purpose" includes "That which a person sets out to do or attain; an object in view; a determined intention or aim."[21] The County's purposes, fears, intentions, and aims are therefore irrelevant to the question whether it discharged Bostock "because of" his sex. The County discharged him because he has the same sex as those he loves while the County retained colleagues who have the opposite sex of those they love. Therefore the County discriminated against him because of his sex.

B. General Legal Usage

American law uses the term "because of" broadly to denote causation without regard to purposes, fears, intentions or aims. This includes liability in tort for negligence ("Plaintiff suffered injuries because of the negligent operation of a cab"),[22] strict liability in tort ("Products Defective Because of Inadequate Directions or Warnings"),[23] and consequential damages in contract ("loss incurred by the breach of contract because of special circumstances or conditions that are not ordinarily predictable").[24] Consequently, the County discriminated against Bostock because of his sex under general legal as well as dictionary usage.

IV. LANDMARK PRECEDENTS

Several landmark discrimination precedents follow these ordinary and legal meanings of terms in Title VII.

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17. *Because*, OXFORD ENGLISH DICTIONARY (2d ed. 1989) (referencing definition A(2)(a)).

18. *Id.* (referencing an example of a letter written in 1717 by Lady M. W. Montagu) (emphasis added).

19. *Id.* (referencing definition A(2)(b), obsolete after 1523).

20. *Id.* (referencing definition A(2)(c), obsolete after 1485).

21. *Purpose*, n., OXFORD ENGLISH DICTIONARY (3d ed. 2007) (referencing definition 1(a), including usage pre- and post-dating 1964).

22. WILLIAM E. BURBY, LAW REFRESHER: CONTRACTS 55 (3d ed. 1963), https://babel.hathitrust.org/cgi/pt?id=uiug.30112021880650&view=1up&seq=85.

23. Dix W. Noel, *Products Defective Because of Inadequate Directions or Warnings*, 23 SW. L.J. 256 (1969).

24. Judicial Educ. Ctr., Univ. of N.M., *Remedies for Breach of Contract*, U. N.M., http://jec.unm.edu/education/online-training/contract-law-tutorial/remedies-for-breach-of-contract (last visited Feb. 14, 2020).

A. Loving

In *Loving v. Virginia*[25] the Supreme Court struck down prohibitions on interracial marriage under a two-part test.[26] Did the statutes make distinctions on account of race? If so, did the state have sufficient basis to justify making the distinctions? Virginia argued that the statutes did not discriminate "based upon race" because they punished both parties to the interracial marriage equally, and that if the statutes did discriminate then the Court should uphold them on a rational basis standard.[27]

Applying the first part of the test, the Court held that the statutes made distinctions on account of race because they utilized racial classifications.[28] "Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races."[29] This characterization is consistent with an Oxford English Dictionary definition of "to discriminate" — "[t]o make or recognize a distinction."[30]

In the second part of the test, the Court held that the statutes failed to meet "the very heavy burden of justification . . . required of state statutes drawn according to race."[31] This was true even though Virginia offered a justification that formally applied "equally" to all races: "to preserve the racial integrity of its citizens."[32] The Court specifically found "the racial classifications in these statutes repugnant to the Fourteenth Amendment, even assuming an even-handed state purpose to protect the 'integrity' of all races."[33] This finding is consistent with the textual ground that the employer's purposes, fears, intentions, and aims are irrelevant when identifying the cause of the employer's discrimination. Discharging employees for being "race traitors"[34] or "Gender Traitors,"[35] for example, utilizes race or sex classifications and therefore discriminates against them because of their race or sex regardless of the employer's purpose.

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25. 388 U.S. 1 (1967).
26. *Id.* at 11.
27. *Id.* at 8.
28. *Id.* at 9.
29. *Id.* at 11.
30. *Discriminate,* v., *supra* note 15.
31. *Loving*, 388 U.S. at 9, 11.
32. *Id.* at 7–8.
33. *Id.* at 12 n.11.
34. *Cf.* RANDALL KENNEDY, SELLOUT: THE POLITICS OF RACIAL BETRAYAL 6 (First Vintage Books ed. 2009) (2008): Reputable people use "sellout" as an insult, and it is broadly seen as serving a useful purpose by identifying and stigmatizing a real menace: the black race traitor. Thus, a person accused of being a sellout will typically want to refute the charge, since, if it is believed, the indictment will generate all manner of negative consequences, including ostracism or even reprisal.
35. *See* MARGARET ATWOOD, THE HANDMAID'S TALE 248 (First Anchor Books ed. 1998) (1986).

B. Williams

A second landmark decision consistent with the ordinary and legal meanings[36] of terms in Title VII is *Williams v. Saxbe*,[37] the first case to recognize that sexual harassment is discrimination "because of" sex. The defendants argued that a male supervisor's firing a female employee for refusing his sexual advances was because of a factor other than her sex: her "willingness to furnish sexual consideration."[38] Because "the criteria of 'willingness to furnish sexual consideration' could be applied to both men and women," the defendants argued, "the class cannot be said to be defined primarily by gender and therefore there can be no . . . sex discrimination."[39]

The court called this "a cogent and almost persuasive argument" but rejected it for two reasons. First, "a finding of sex discrimination . . . does not require that the discriminatory policy or practice depend upon a characteristic peculiar to one of the genders. That a rule, regulation, practice, or policy is applied on the basis of gender is alone sufficient for a finding of sex discrimination."[40] This explanation is consistent with the definition of "to discriminate" as merely making or recognizing a distinction,[41] and the definition of "to discriminate against" as merely "[t]o treat a person or group in an unjust or prejudicial manner."[42] The definitions do not require that the treatment depend on a characteristic peculiar to a group. Second, "the reason for the discrimination under Title VII is not necessary to a finding of discrimination. . . . Rather, the reason for the discrimination may only be relevant in considerations of whether the policy or practice is based upon a bona fide occupational requirement."[43]

C. Griggs and Ricci

For the second point in *Williams*, the opinion relied on the Supreme Court's recognition in *Griggs v. Duke Power Co.*[44] that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[45] The Supreme

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36. *See supra* Part III.

37. 413 F. Supp. 654 (D.D.C. 1976) (finding discrimination because of sex), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *on remand*, Williams v. Civiletti, 487 F. Supp. 1387, 1389 (D.D.C. 1980) (finding discrimination because of sex).

38. *Williams*, 413 F. Supp. at 658.

39. *Id.* (emphasis in original omitted).

40. *Id.* (citing Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971); Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971), *cert. denied*, 404 U.S. 991 (1971)).

41. *Discriminate,* v., *supra* note 15 (referencing definition 2(b)).

42. *Discriminate,* v., *supra* note 16 (referencing definition 4).

43. *Williams*, 413 F. Supp. at 659 n.6.

44. Griggs v. Duke Power Co., 401 U.S. 424 (1971).

45. *Williams*, 413 F. Supp. at 659 n.6 (quoting *Griggs*, 401 U.S. at 432).

Court reiterated the distinction in *Ricci v. DeStefano*,[46] where it found an employer's consideration of race in hiring to violate Title VII even though the employer's purpose was to avoid disparate impact liability under Title VII itself.[47] The Court limited the referent for determining the existence of discrimination to the employer's conduct, forbidding reference to the employer's aim:

> But both of those statements turn upon the City's objective—avoiding disparate-impact liability—while ignoring the City's conduct in the name of reaching that objective. Whatever the City's ultimate aim—however well intentioned or benevolent it might have seemed—the City made its employment decision because of race. . . . The question is not whether that conduct was discriminatory but whether the City had a lawful justification for its race-based action.[48]

These decisions are consistent with the dictionary definition of "because of" to refer to causation, not to the discriminator's purposes, fears, intentions or aims.[49] They are also consistent with Bostock's interpretation of Title VII.[50] Clayton County's decision utilized a sex-based classification and therefore was because of his sex regardless of the County's subjective aims.

V. EARLY SEX-BASED CLASSIFICATION PRECEDENTS

Many precedents dating from the early 1970's found that restricting employment opportunity based on whether an employee is the same gender as or opposite sex of fellow employees, clients, or others discriminates against employees because of their sex.

A. Sex Segregated Union Locals

Congress added "sex" to the list of prohibited classifications late in the process of enacting Title VII.[51] During that time, many considered sex to be less important than race in workplace discrimination,[52] so plaintiffs in *Evans v. Sheraton Park Hotel*[53] had to sue for recognition that sex segregated union locals violated Title VII. The union defendant acknowledged that the Fourth Circuit found racial segregation to be a *per se* Title VII violation in an action against the International Longshoremen's Association ("ILA").[54] The

46. 557 U.S. 557 (2009).
47. *Id.* at 580.
48. *Id.* at 579–80.
49. *See supra* notes 18–21 and accompanying text.
50. *See infra* Part III.A (applying a dictionary definition of "because of" to explain that County discharged Bostock because he has the same sex as those he loves).
51. *See* GILLIAN THOMAS, BECAUSE OF SEX 10 (St. Martin's Press 2016).
52. *See id.* at 14–15.
53. 503 F.2d 177 (D.C. Cir. 1974).
54. *Id.* at 185 (citing United States v. International Longshoremen's Association, 460 F.2d 497 (4th Cir. 1972), *cert. denied*, 409 U.S. 1007 (1972)).

union attempted to distinguish that precedent on the ground that it relied on the Supreme Court's holding in *Brown v. Board of Education*[55] and therefore "is limited to racial segregation. There being no Brown in the area of sex segregation . . . there is no reason to assume that the principles applicable to the effects of racial segregation apply to the effects of sex segregation."[56]

The D.C. Circuit rejected the distinction outright, finding sex segregated locals to be a *per se* violation of Title VII:

> The unions in ILA were segregated on the basis of race. The unions here were segregated on the basis of sex. The precise statute (42 U.S.C. § 2000e-2(c)(2)) involved in ILA is the one involved here. It specifically prohibits discrimination based on race, color, religion, sex, or national origin. . . . Congress, in enacting Title VII found classifications based on sex inherently invidious. We think the District Court correctly held that maintenance of unions segregated on the basis of sex constitutes a per se violation of 42 U.S.C. § 2000e-2(c).[57]

B. Opposite Sex Massages

Many American cities have enacted ordinances forbidding "opposite sex"[58] massages in massage parlors in order to prevent "immoral acts likely to result from too intimate familiarity of the sexes."[59] As one court explained, "[t]he inclusive nature of these 'massages' offends the sensibilities of this community."[60] Emphasizing the sex-based classification involved, some characterized opposite sex massages as "bisexual."[61]

A number of cases beginning in the 1970's found that the ordinances discriminate against massagists on the basis of their sex. The most notable case is the Washington State Appeals Court decision in *J.S.K. Enterprises, Inc. v. City of Lacey*.[62] The court

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55. 347 U.S. 483 (1954).

56. *Evans*, 503 F.2d at 185.

57. *Id.* at 185–86 (emphasis omitted).

58. *See, e.g.*, ordinances cited in Aldred v. Duling, 538 F.2d 637, 637 (4th Cir. 1976); *In re* Maki, 56 Cal. App. 2d 635, 638 (Cal. Ct. App. 1943). For an analysis of constitutional and Title VII challenges to the ordinances, see Andrew A. Jaxa-Debicki et al., *Hands Off!! The Validity of Local Massage Parlor Laws*, 10 U. RICH. L. REV. 596, 619–24 (1976).

59. In re *Maki*, 56 Cal. App. 2d at 639. *Cf.* J.S.K. Enters., Inc. v. City of Lacey, 6 Wash. App. 43, 49 (Div. Two 1971) ("the objective of protecting the public from lewd acts"), *review denied*, 6 Wash. App. 433 (Div. Two 1972) (dismissing damage claim but adhering to remainder of prior opinion), *petition for review denied*, 80 Wash. 2d 1006 (1972).

60. Cianciolo v. Members of City Council, 376 F. Supp. 719, 721 (E.D. Tenn. 1974).

61. *See id.* at 720. *See also* Joseph v. House, 353 F. Supp. 367, 369 (E.D. Va. 1973), *aff'd*, Joseph v. Blair, 482 F.2d 575 (4th Cir. 1973), *reh'g denied*, 488 F.2d 403 (4th Cir. 1973), *cert. denied*, 416 U.S. 955 (1974).

62. *J.S.K. Enters.,* 6 Wash. App. at 52–53 (striking down an ordinance prohibiting opposite sex massages).

characterized the prohibition as a "blanket-type classification by sex" that did not reflect "the right of both men and women to be free from sex discrimination in employment as such rights exist today."[63] It characterized the argument that "since women massagists could massage women and men massagists could massage men, both sexes were treated equally" as "analogous to the rule of *Plessy v. Ferguson*."[64] It struck down the ordinance, holding that "separate but equal" opportunities of employment for men and women are not justified unless the difference in classification as to sex bears a rational relationship to the objective that is sought to be advanced and is not unreasonable, unnecessary, arbitrary or unduly oppressive. . . . The rule of *Plessy v. Ferguson* . . . is not a viable doctrine with respect to sex segregation.[65]

Other decisions, including *Stratton v. Drumm*,[66] enjoined opposite sex massage ordinances under the doctrine of federal supremacy because they force employers to classify employees by sex in violation of Title VII or to violate the equal employment rights of their massagist employees.[67] The *Stratton* court explained that

> such an ordinance requires an employer "to limit, segregate or classify his employees" by sex. . . . [A] female massagist could not compete with males for the work of massaging male customers, and a male massagist could not compete with females for the work of massaging female customers. As the court recognized in *Cianciolo v. Members of City Council, supra*, the ordinance "would deprive or tend to deprive" both male and female massagists "of employment opportunities because of [their] . . . sex. . . ." § 703(a)(2) [of Title VII], *supra*.[68]

For the same reasons, an ordinance prohibiting same sex massages would discriminate against each employee because of such employee's sex under Title VII. It would require employers to classify their massagist employees by sex. It would prevent a female massagist from competing with males for the work of massaging female customers, and a male massagist from competing with females for the work of massaging male customers.

Finally, *Olsen v. Marriott International, Inc.*[69] considered opposite sex massage and Title VII in a more professional facility. Ralph Olsen sued a Marriott spa for sex discrimination under Title VII for refusing to employ him as a massage therapist because he is male. The spa defended its employment decision on the ground that

63. *Id.* at 49.
64. *Id.* at 52.
65. *Id.* at 52–53.
66. 445 F. Supp. 1305 (D. Conn. 1978).
67. *See also* Joseph v. House, 353 F. Supp. 367, 375 (E.D. Va. 1973).
68. *Stratton*, 445 F. Supp. at 1312.
69. 75 F. Supp. 2d 1052, 1052 (D. Ariz. 1999).

sex is a BFOQ for massage therapists to the extent of client requests for female therapists because of the clients' privacy concerns.[70]

The court recognized that third party privacy concerns can justify sex-specific employment. However, mere customer preferences cannot. Customer preferences, such as preferences for female flight attendants, are the very kind of discrimination that Title VII seeks to overcome.[71] Moreover, privacy does not automatically justify sex-specific employment. Where possible, employers must use reasonable alternatives other than blanket sex discrimination to protect a client's privacy.[72]

The *Olsen* court found that the Marriott spa did not justify its claim that customer privacy drove its decision. Some customers preferred opposite sex therapists, and the spa had clear rules against touching private body parts. The court also found that the spa did not consider reasonable alternatives, such as using a sheet to cover those parts during the massage. The court rejected the spa's defense to Olsen's Title VII claim.[73]

C. Opposite Sex Correctional Officers

Many believe that same sex staffing is critical for correction and rehabilitation.[74] *Philadelphia v. Human Relations Commission*[75] considered the city's practice of restricting supervisors of juvenile inmates to persons of the "same gender"[76] despite a state law generally prohibiting discrimination because of the sex of any individual.[77] Neither the City, Commission, nor court denied that the practice discriminated against supervisors because of their sex; the only relevant issue was whether sex was a BFOQ for the position. The court found sex to be a BFOQ in the unique circumstances of the juvenile detention facilities.[78] These included (i) the potential trauma for children as young as seven from being subject to supervision while nude by, and to body searches by, members of the opposite sex,[79] (ii) the presence of older male inmates incarcerated for "assault with intent to ravish" and other crimes that might create particular risks for female supervisors,[80] and (iii) the likelihood that female inmates would make unfounded charges of molestation against male

70. *Id.* at 1057.
71. *Id.* at 1065.
72. *Id.* at 1068–69.
73. *Id.* at 1076.
74. *See, e.g.*, *infra* note 107 and accompanying text.
75. 300 A.2d 97 (Pa. Commw. Ct. 1973).
76. *Id.* at 98.
77. *Id.* at 100.
78. *Id.* at 99 (explaining the unique dangers to a female supervisor in a male facility).
79. *Id.* at 102–103.
80. *Id.* at 101.

supervisors for purposes of harassment, making it impossible to administer the facilities.[81]

Four years later, the Supreme Court held that such an employment restriction explicitly discriminates because of sex under Title VII in similar circumstances in *Dothard v. Rawlinson*.[82] Alabama prison Regulation 204 (the "Regulation") permitted sex-specific assignment of guards in adult penitentiaries where, among other factors, (i) "the position would require contact with the inmates of the opposite sex without the presence of others," (ii) "the position would require search of inmates of the opposite sex on a regular basis," and (iii) "the presence of the opposite sex would cause disruption of the orderly running and security of the institution."[83] Applying the Regulation, Alabama did not employ any male guards in contact positions at its female penitentiary or any female guards in contact positions at its male penitentiaries.[84]

Dianne K. Rawlinson challenged the state's application of the Regulation to deny her a contact position at a male penitentiary as discrimination because of her sex under Title VII and the Equal Protection Clause of the Fourteenth Amendment.[85] She also challenged the state's minimum height and weight requirements for the position on the same grounds.[86]

A three-judge trial court found that the height and weight requirements had a disproportionate impact on women, were not justified in the circumstances of the case, and were invalid under Title VII.[87] The court presumed without explanation that applying the Regulation constituted prima facie discrimination because of the guards' sex. It rejected the state's claim that the inmates' right to privacy and other factors made sex a BFOQ for contact positions in penitentiaries. The court found that any "tension between the individual's right to employment without regard to *his or her sex* and the inmates' right to privacy can be resolved by selective work responsibilities among correctional officers rather than by selective job classifications."[88] It enjoined enforcement of the Regulation in its entirety.[89]

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81. *Id.*

82. 433 U.S. 321, 325, 332 (1977).

83. *See id.* at 325 n.6. The Regulation's literal text was not limited to penitentiaries, but the state applied and defended it in the more limited use. *Id.*

84. *See* Brief of Appellants at 35, Dothard v. Rawlinson, 433 U.S. 321 (Jan. 24, 1977) (No. 76–422), http://wakeforestlawreview.com/wp-content/uploads/2020/02/Brief-of-Appellants.pdf. The case briefs and motions are titled "Dothard v. Mieth" consistent with the action below.

85. *Rawlinson*, 433 U.S. at 325–26.

86. *Id.* at 324.

87. Mieth v. Dothard, 418 F. Supp. 1169, 1183–84 (M.D. Ala. 1976) (per curiam) (emphasis added), *aff'd in part, rev'd in part sub nom.* Dothard v. Rawlinson, 433 U.S. 321 (1977).

88. *Id.* at 1185 (emphasis added).

89. *Id.*

In Alabama's appeal to the Supreme Court, Rawlinson described the Regulation as "facially discriminatory."[90] She characterized it as "a sex-based classification because it uses sex as the sole definitional factor in creating two classes: one to work in male prisons and the other in the female prisons."[91]

Alabama, on the other hand, argued that both the Regulation and its application were "facially neutral by affecting both men and women with no distinction. . . . [N]either men nor women are used in contact positions with penitentiary prisoners of the opposite sex."[92] The Regulation "applies to both males and females equally. No distinction is made between the treatment of females as opposed to that of males under Regulation 204. For that reason . . . the terms of the regulation show no gender-based discrimination."[93]

Alabama summarized the opposing positions, stressing the importance of the combination of the sexes of the guard and the inmates to its analysis:

> [T]he guard/employee's sex is a factor in assigning guards to contact positions within penitentiaries. It is not the only factor however, since the sex of inmates to be guarded must also be considered. Appellees contend that the elemental factor of the guard's sex in the decision for assignment makes this a case of explicit sex discrimination bringing into play the defense of a bona fide occupational qualification. We contend such is not the case and that the facts present only a case of disproportionate impact requiring a showing of business necessity.[94]

At oral argument the state's Assistant Attorney General, G. Daniel Evans, insisted that the Regulation applied to "the combination of sex," but he admitted under pointed questioning that such a rule distinguishes between women and men as such:

> Justice: The regulation deals very frankly with sex, with gender, if you will . . .
>
> Evans (interrupting): It deals with combination.

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90. *See* [Appellee's] Motion to Dismiss or Affirm at 10, Dothard v. Rawlinson, 433 U.S. 321 (1977) (No. 76–422), http://wakeforestlawreview.com/wp-content/uploads/2020/02/Appellees-Motion-to-Dismiss-or-Affirm.pdf.

91. *See* Brief for the Appellees at 11, Dothard v. Rawlinson, 433 U.S. 321 (1977) (No. 76–422), http://wakeforestlawreview.com/wp-content/uploads/2020/02/Brief-for-the-Appellees.pdf.

92. *See* Brief of Appellants, *supra* note 84, at 33, 35.

93. *See id.* at 34.

94. *See* Reply Brief of Appellants at 9, Dothard v. Rawlinson, 433 U.S. 321 (Apr. 15, 1977) (No. 76–422), http://wakeforestlawreview.com/wp-content/uploads/2020/02/Reply-Brief-of-Appellants.pdf. *See also* Brief of Appellants, *supra* note 84, at 34 ("It is the combination of . . . factors which determines a job assignment for any guard, male or female."); *id.* at 35 (potential disparate impact because Alabama had more male than female facilities).

> Justice: . . . unlike the height and weight requirement. This is a frankly gender based distinction.
>
> Evans: It deals with the combination of sex—that is exactly right Your Honor.
>
> Justice: Distinguishes between females and males as such.
>
> Evans: Exactly Your Honor.[95]

The Supreme Court agreed with Rawlinson's characterization of the Regulation. All eight Justices who reached the issue found that it "establish[es] gender criteria for assigning" guards[96] and therefore "explicitly discriminates,"[97] unlike the "facially neutral" height and weight requirements that merely had a disparate impact.[98]

The Court then analyzed the BFOQ exception as the only potential defense to the Regulation's "overt discrimination."[99] The state had cited *Philadelphia* as precedent for accepting "explicitly gender based" staffing in correctional facilities.[100] A majority of the Supreme Court found that sex was a BFOQ in *Rawlinson*,[101] although on narrower grounds than did the *Philadelphia* court. The majority found that the extreme levels of uncontrolled violence in Alabama's male penitentiaries and the high percentage of sex offenders within them created the likelihood of assaults on female guards "that would pose a real threat . . . to the basic control of the penitentiary and protection of its inmates and the other security personnel."[102] The Court did not accept the claim that adult inmate privacy[103] or the risk to the female guards themselves[104] justified sex as a BFOQ.

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95. Oral Argument at 23:40 to 23:57, Dothard v. Rawlinson, 433 U.S. 321 (1977) (No. 76–422) (author's transcription, which differs slightly from the Oyez.org transcription), https://www.oyez.org/cases/1976/76-422.

96. *Rawlinson*, 433 U.S. at 325.

97. *Id.* at 332. Justice White did not reach the issue because he found the height and weight requirements to be a valid bar to her employment. *See id.* at 349 (White, J., dissenting).

98. *See id.* at 329 ("facially neutral"); *id.* at 332 (upholding trial court's disparate impact ruling).

99. *See id.* at 332–33.

100. *See* Brief of Appellants, *supra* note 84, at 49.

101. *See Rawlinson*, 433 U.S. at 336–37.

102. *Id.* at 336. *See id.* at 334 (conditions in penitentiaries); *id.* at 336 (likelihood of assault and attendant consequences).

103. *See id.* at 346 n.5 (Marshall, J., concurring in part and dissenting in part) (characterizing the proffered justification as "nothing but a feeble excuse for discrimination" given the inhuman conditions in the penitentiaries).

104. The Court accepted that guards have a Title VII right to assume that risk for themselves. *See id.* at 335.

The state's safety and control aims were irrelevant to the primary question whether it discriminated against Rawlinson because of her sex. The state utilized a sex-based classification and therefore explicitly discriminated against her because of her sex. *Bostock* also involves the combination of sex—that of the employee and of those he loves. Adapting Rawlinson's characterization, the County uses sex to create two classes: one that is allowed to love men, and the other that is allowed to love women.[105] The County's elemental consideration of Bostock's sex in discharging him because he is not allowed to love men explicitly and overtly discriminated against him because of his sex.

Rawlinson has protected women and men from discrimination because of their sex for over forty years.[106] Chief Judge Easterbrook explained the discrimination inherent in sex-based classifications in a 2008 opinion equating sex with race and rejecting sex as a BFOQ for officers in modern juvenile detention units:

> Employers frequently assert that inmates (or students) respond more favorably to guards (or teachers) of their own sex or race. If this sort of justification had been advanced for matching the race of the inmates and the guards (or students and their teachers), courts would not go along. . . . Why then should courts accept the same sort of "justification" for sex discrimination?[107]

The Justices' opinions in *Rawlinson* did not cite the labor union, massage, or juvenile facility cases discussed above.[108] But the

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105. *Cf.* Brief for the Appellees, *supra* note 91 and accompanying text (Regulation 204 uses sex to create "two classes: one to work in male prisons and the other in the female prisons."). This is an alternative framing of the two classes (i) employees who have the same sex as those they love, and (ii) employees who have the opposite sex of those they love. The framing is irrelevant; the consequences are the same. And the consequences of the employer's conduct determine the Title VII result. *See, e.g., supra* notes 45–48 and accompanying text.

106. *See, e.g.*, Forts v. Ward, 621 F.2d 1210 (2d Cir. 1980) (male guards). New York State originally assigned male guards to the women's prison involved in *Forts* because the state and the correctional officers' union recognized "that Title VII of the 1964 Civil Rights Act requires nondiscriminatory work assignments." Forts v. Ward, 566 F.2d 849, 851 n.1 (2d Cir. 1977).

107. Henry v. Milwaukee Cty., 539 F.3d 573, 588 (7th Cir. 2008) (Easterbrook, Chief Judge, concurring) (citations omitted). The *Henry* court found that a "same sex" staffing policy requires "sex-based classifications" of employees, rejected proffered justifications for sex as a BFOQ in the juvenile detention units, and struck down the policy under Title VII. *See id.* at 575–78, 585–86. *Henry* involved a same sex policy that applied to staffing both all-male and all-female units and therefore affected both female and male correctional officers. The court considered but distinguished BFOQ precedents that only applied to exclude male guards from women's prisons. *See id.* at 580. *Henry* anticipated the Seventh Circuit's Title VII sexual orientation decision in *Hively*, *supra* note 4 and accompanying text, by nine years.

108. *See supra* Part V.

decision ratified their holdings. "Opposite sex" and "same sex" restrictions explicitly discriminate against each employee or applicant because of that individual's sex. The "equal" right to guard only members of your own sex is like the "equal" right to massage only them or to join only their union local. It is *Plessy* "equality," and it has no place in Title VII.

VI. CONTRARY AUTHORITIES

Many cases from the 1970's reached the opposite conclusion regarding classifications based on the relative sexes of two persons. Their interpretations of discrimination "because of sex" are inconsistent with *Rawlinson* and should be disregarded.

A. Same Sex Marriage

In September of 1971 John F. Singer and Paul Barwick applied for a marriage license in Washington.[109] The state refused to issue the license and the men sued. They alleged among other causes that the refusal violated the Equal Rights Amendment to the Washington Constitution, which provides: "Equality of rights and responsibility under the law shall not be denied or abridged on account of sex."[110] The Washington Court of Appeals rejected their claim. The court's decision did not respect the text of the Equal Rights Amendment—even Phyllis Schlafly of the anti-gay Eagle Forum derided the court's reasoning.

Schlafly explained that the court based its decision on four grounds. The first was that it is "obvious" that marriage by its legal nature is "the legal union of one man and one woman" under state statutes.[111] Schlafly responded that this is irrelevant because the state constitution overrides state statutes.[112] Indeed, the court feebly attempted to distinguish *Loving* and its own earlier opposite sex massage decision in *J.S.K. Enterprises* by declaring that what Singer and Barwick proposed simply was not "marriage."[113]

The second ground was that the court could not conceive that Washington voters intended the amendment to open marriage to same sex couples.[114] Schlafly responded that the evidence about

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109. *See* Singer v. Hara, 11 Wash. App. 247, 247–48 (Div. One 1974), *petition for review denied*, 84 Wash.2d 1008 (1974); Kristin M. Hayman, *John Singer & Paul Barwick's Selfless Pursuit of Marriage Equality* 1, 3 http://supportspl.org/wp-content/uploads/2017/06/John-Singer-Paul-Barwick%E2%80%99s-Selfless-Pursuit-of-Marriage-Equality.pdf.

110. *Singer*, 11 Wash. App. at 250.

111. *See Equal Rights Amendment: Hearings on H.R.J. Res. 1 Before the Subcomm. on Civil & Constitutional Rights of the H. Comm. on the Judiciary*, 98th Cong. 444 (1983) [*hereinafter* "Hearings"], https://hdl.handle.net/2027/pst.000016146150?urlappend=%3Bseq=450. *Cf. Singer*, 11 Wash. App. at 253–55.

112. *See* Hearings, *supra* note 111, at 444.

113. *See id.* at 445. *Cf. Singer*, 11 Wash. App. at 255.

114. *See* Hearings, *supra* note 111, at 445. *Cf. Singer*, 11 Wash. App. at 257.

voters' intent was inconclusive at best, citing statements in the state's official Voters' Pamphlet that the proposed ERA would legalize homosexual and lesbian marriages.[115] And for a textualist, the intent of the voters is irrelevant.

The third ground was that the state did not treat Singer and Barwick differently than it would have "'if they were females.'"[116] Schlafly responded that this depends on how one interprets "they": the state clearly treated Singer differently than it would have a woman who applied to marry Barwick.[117] And the court's own earlier decision in *J.S.K. Enterprises* rejected the *Plessy* "equality" of treating two males the same as two females.

The fourth ground was that the state's prohibition resulted from the impossibility of reproduction rather than sex discrimination.[118] Schlafly dismissed this out of hand because the state does not prohibit childless heterosexual marriages.[119] This ground is not within the text of the Equal Rights Amendment, so a textualist would dismiss it as well. Schlafly concluded that

> it is clear that the arguments used by the court are simply not compatible with the arguments used by courts to invalidate other statutes under State ERAs. The *Singer* decision is out of touch with the absolutism enforced by other courts when rights are asserted under a State ERA. It is easy to see how courts in other states could reject the reasoning of *Singer* and come to the opposite conclusion. And there is no reason to believe that the federal courts will feel in any way bound by the *Singer* court.[120]

The federal Equal Rights Amendment is almost identical to Washington State's.[121] Schlafly insisted that the federal ERA would reach "sexual preference" unless it were amended to be more explicit because "[t]he word used in ERA is 'sex,' not 'women,' and the 'sex' in ERA is not defined or limited in any way."[122] The Eagle Forum now

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115. *See* Hearings, *supra* note 111, at 445.

116. *See id. Cf. Singer*, 11 Wash. App. at 258.

117. *See* Hearings, *supra* note 111, at 445. Schlafly acknowledged that Singer and Barwick had sued jointly and questioned whether the court would have ruled differently had Singer sued alone. *See id.*

118. *See id.* at 445–46. *Cf. Singer*, 11 Wash. App. at 260.

119. *See* Hearings, *supra* note 111, at 446.

120. *See id.*

121. U.S. CONST. amend. XXVIII, § 1 ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.") (ratification disputed). Accessible at Proposed Amendment to the Constitution of the United States, H.R.J. Res. 208, 92d Cong. (1972).

122. *The Impact of the Equal Rights Amendment: Hearings on S.J. Res. 10 Before the Subcomm. on the Constitution of the Sen. Comm. on the Judiciary*, 98th Cong. 343 (1985), https://hdl.handle.net/2027/mdp.39015012249291?urlappend=%3Bseq=351. *Cf.* Brief of William N. Eskridge Jr. and Andrew M. Koppelman as *Amici Curiae* in Support of Employees, Bostock v. Clayton Cty., at 20–21, 28 (July 2019) (No. 17-1618) (other period statements that the federal Equal Rights Amendment reaches same sex relationships).

attacks Bostock for interpreting "sex" to reach sexual orientation, claiming that he "disregard[s] the supremacy of the text" of Title VII.[123] The Eagle Forum's about-face bolsters the charge that textualism is mere window dressing that conservatives use to cloak their predetermined decisions in controversial cases.[124]

B. Opposite Sex Housing and Massages

The most direct contrary authorities involve housing and massage parlors. *Braunstein v. Dwelling Managers, Inc.*,[125] for example, considered a New York City policy of allocating two-bedroom apartments to single parents with an opposite sex child but only one-bedroom apartments to single parents with a same sex child. The latter argued that the policy violated the Fair Housing Act's prohibition on sex discrimination, analogizing to Title VII's causation test—if their sex were different, they would have received the larger apartments.

The court rejected their claim, finding "that the variable which determines allocation of two bedroom apartments is not the sex of the individual plaintiffs, but the composition of the family unit."[126] It reasoned that sex discrimination only exists "when the opportunities or benefits offered . . . to one gender are less valuable or more restricted than those offered to the other,"[127] which did not exist in the case because "[a] mother and daughter who reside together receive the same treatment as a father and son; neither family is eligible for rental of a two bedroom apartment."[128]

Braunstein's "composition of the family unit" is the same as *Rawlinson's* "combination of sex," which Alabama admitted "[d]istinguishes between females and males as such"[129] and which the Supreme Court found to explicitly discriminate against Rawlinson because of her sex. Title VII does not protect units or genders. It protects each individual against discrimination because of such individual's sex. The reasoning in *Braunstein* is incompatible with *Rawlinson*.

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123. *See* Brief Amicus Curiae of Public Advocate of the United States, Conservative Legal Defense and Education Fund, Poll Watchers, Policy Analysis Center, Eagle Forum Foundation, Pastor Chuck Baldwin, Restoring Liberty Action Committee, and Center for Morality in Support of the Employers, Bostock v. Clayton Cty., at 4 (Aug. 23, 2019) (No. 17-1618).

124. *See, e.g.*, Richard A. Posner, *The Incoherence of Antonin Scalia*, NEW REPUBLIC (Aug. 24, 2012), https://newrepublic.com/article/106441/scalia-garner-reading-the-law-textual-originalism (Textualism's many ambiguous canons of interpretation leave "all the room needed to generate the outcome that favors Justice Scalia's strongly felt views on such matters as abortion, homosexuality, illegal immigration, states' rights, the death penalty, and guns.").

125. 476 F. Supp. 1323 (S.D. N.Y. 1979).

126. *Id.* at 1327.

127. *Id.* (citation omitted).

128. *Id.*

129. *See* Oral Argument, *supra* note 95 and accompanying text.

Similarly, many cases from the 1970's found that opposite sex massage prohibitions did not discriminate on the basis of sex because they applied equally to each sex. In *Aldred v. Duling*,[130] for example, the Fourth Circuit found that "[t]he ordinance is not inconsistent with Title VII and must be upheld. . . . The restrictions imposed by the Richmond ordinance apply equally to males and females; neither can perform massages on customers who are members of the opposite sex."[131] The reasoning in *Aldred* is also incompatible with *Rawlinson*.

The court in *Wigginess Inc. v. Fruchtman*[132] upheld a city ordinance forbidding opposite sex massages against a Title VII challenge, following *Aldred* and specifically disagreeing with *Stratton*.[133] The *Wigginess* court characterized the ordinance as "facially neutral."[134] The court reasoned further that the ordinance does not require the massage parlors to discharge or refuse to hire anyone; it merely "makes it unlawful to operate certain establishments. The result of plaintiffs' ceasing an unlawful operation may be to curtail employment opportunities for female massagists, but this surely does not preclude the city's exercising its police power to prohibit practices it finds harmful. . . ."[135]

The *Wigginess* decision is incorrect for the same reason as *Aldred*. A "no opposite sex" rule is not facially neutral. It explicitly and overtly discriminates against each employee because of the employee's sex, as the Supreme Court held in distinguishing the "no opposite sex guards" rule from the facially neutral height and weight requirements in *Rawlinson*.

Finally, many cases have found that Title VII does not apply to sexual orientation discrimination.[136] They will stand or fall with the Supreme Court's decision in *Bostock*.

Why didn't the *Braunstein*, *Aldred* and *Wigginess* judges see the sex discrimination? Almost fifty years ago Philadelphia recognized the discrimination inherent in its policy of assigning supervisors of the "same gender" to juvenile inmates and proactively sought a BFOQ waiver from the Commonwealth's Human Relations Commission.[137] It may be that powerful background issues of privacy and government authority influenced the decisions in the former cases. *Braunstein* involved the privacy of children and New York City's allocation of scarce housing resources. *Aldred* and *Wigginson* involved the police power over massage parlors that were little more than fronts for

130. 538 F.2d 637 (4th Cir. 1976).
131. *Id.* at 638.
132. 482 F. Supp. 681 (S.D.N.Y. 1979), *aff'd*, 628 F.2d 1346 (2d Cir. 1980).
133. *See id.* at 692–93.
134. *Id.* at 691.
135. *Id.*
136. *See, e.g.*, Blum v. Gulf Oil Corp., 597 F.2d 936, 938 (5th Cir. 1979) (per curiam) (citing Smith v. Liberty Mut. Ins. Co., 569 F.2d 325, 327 (5th Cir. 1978)).
137. *See* City of Philadelphia v. Pa. Human Relations Comm'n, 300 A.2d 97, 98 (Pa. Commw. Ct. 1973).

prostitution. They differ considerably from *Olsen*, which involved two private parties and a professionally operated facility.

It might be proper for courts to balance privacy rights against Congress's power under the Commerce and Equal Protection Clauses to guarantee equal employment opportunities. It might also be proper for courts to consider whether they need to interpret Title VII to undermine the police power to forbid prostitution.[138] These approaches would not justify denying the existence of sex discrimination in the three cases but might justify their results. Ruling that Clayton County did not discriminate against Bostock because of his sex, on the other hand, would implicitly overrule *Rawlinson* and over forty years of precedents following it.

Allowing judges to consider privacy, government power, or other principles when interpreting Title VII entails risk. Justices Marshall and Brennan feared that the ostensibly narrow BFOQ exception in *Rawlinson* would one day swallow the rule.[139] California urged the *Rawlinson* Court not to recognize expansive inmate privacy rights because that could exclude a large percentage of the available workforce and impede state efforts to create a genuinely rehabilitative prison environment.[140] Courts have since recognized expansive adult inmate privacy rights, limiting equal employment opportunities.[141] In addition, the police power should not override the equal opportunity to provide legitimate services when reasonable alternatives to blanket discrimination can achieve the government's objectives. Nevertheless, these broader approaches, not textualism, reflect the reality of American constitutional and statutory interpretation.

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138. The Supreme Court has dismissed constitutional (but not Title VII) challenges to municipal ordinances prohibiting opposite sex massages for want of a substantial federal question, presumably because the government's police power justification outweighs the discrimination. For a general discussion of the Court's actions and the residual ability to challenge the ordinances under Title VII, see Jaxa-Debicki et al., *supra* note 58 at 619, 624. *Cf.* Colo. Springs Amusements, Ltd. v. Rizzo, 428 U.S. 913, 919–20 (1976) (Brennan, J., dissenting from a decision dismissing a constitutional challenge to such an ordinance for want of a federal question because such dismissals are unexplained, opaque, and leave lower courts to guess the grounds).

139. *See* Dothard v. Rawlinson, 433 U.S. 321, 347 (1977) (Marshall, J., concurring in part and dissenting in part).

140. *See* [redacted] of California [redacted] Amicus Curiae Brief at 8, Dothard v. Rawlinson, 433 U.S. 321 (1977) (No. 76-422), http://wakeforestlawreview.com/wp-content/uploads/2020/02/California-Amicus.pdf.

141. For a discussion of the conflict between privacy and equal employment rights generally as well as the conflict between the equal employment rights of male guards and female guards within the same facility when the government must respect inmate privacy, see Forts v. Ward, 621 F.2d 1210, 1215–16 (2d Cir. 1980).

VII. CRITIQUE OF OPPOSING ARGUMENTS

Clayton County and its supporters make a number of textual and doctrinal arguments in defense of the right to discharge Bostock for being gay notwithstanding Title VII.

Some of the County's supporters suggest that a law or employment decision can only discriminate because of sex if it utilizes words like "men" or "women;" if it can be framed without using those words then it discriminates because of some reason other than sex.[142] But the Regulation in *Rawlinson* used the term "opposite sex" in the provisions that governed staff assignments.[143] The municipal massage ordinances also used the term "opposite sex."[144] And both *Philadelphia* and *Henry* addressed practices of assigning supervisors of the "same gender"[145] or "same sex"[146] as the juvenile inmates. The union in *Evans* could not have escaped Title VII liability by framing its policy to forbid admitting opposite sex members to the same local.

Consequently, a "same sex" or "opposite sex" classification discriminates because of an employee's or applicant's sex even if the employer is unaware of that person's sex.[147] Similarly, a policy of refusing to hire "race traitors" discriminates against individuals because of their race, even if the employer is unaware of any given applicant's race. An employer's subjective framing is irrelevant to Title VII. If a rule, policy or decision utilizes classifications like "interracial," "race traitor," "same sex," or "opposite sex" then it discriminates—it makes a distinction—based on each individual's race or sex.

The County attempts to distinguish race discrimination cases like *Loving* by characterizing them as based on inherent racism.[148] But the text of Title VII includes "sex" in the same operative sentences as "race."[149] Courts have rejected the defense that race is

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142. *See* Reply Brief for Respondents at 4–5, Altitude Express, Inc. v. Zarda, No. 17-1623 (U.S. Sept. 10, 2019).

143. *See Rawlinson*, 433 U.S. at 325 n.6. The respondent in *Zarda* argues that Alabama "could not have masked its discrimination against Rawlinson by labeling the rule 'no opposite-sex contact' and then claiming the rule applied equally to men." *See* Reply Brief for Respondents, *supra* note 142, at 5. In fact, the operative provisions of the Regulation did use the term "opposite sex."

144. *See* sources cited *supra* note 58 and accompanying text.

145. *See* City of Philadelphia v. Pa. Human Relations Commission, 300 A.2d 97, 98 (Pa. Commw. Ct. 1973).

146. *See* discussion *supra* note 107.

147. *See, e.g.*, Amanda Shanor, *Sex Discrimination Behind the Veil Is Still Sex Discrimination*, TAKE CARE BLOG (Oct. 11, 2019), https://takecareblog.com/blog/sex-discrimination-behind-the-veil-is-still-sex-discrimination (refuting Justice Alito's suggestion that one can hide behind ignorance of the employee's sex and avoid liability for sex discrimination in these circumstances). *Cf. Rawlinson*, 433 U.S. at 330 ("[O]therwise qualified people might be discouraged from applying because of a self-recognized inability to meet the very standards challenged as being discriminatory.").

148. *See* Brief for Respondent, *supra* note 5, at 41–42.

149. *See, e.g.,* Evans v. Sheraton Park Hotel, 503 F.2d 177, 185 (D.C. Cir. 1974) ("The precise statute (42 U.S.C. § 2000e-2(c)(2)) involved in ILA is the one

different since the early 1970's.[150] If there were any doubt before 1977, *Rawlinson* dispelled it. "Same gender" and "opposite sex" are sex-based classifications that discriminate against each individual, male or female, because of such individual's sex.

The County also seeks to diminish Bostock's claim by characterizing it as a new interpretation of Title VII.[151] However, the Equal Employment Opportunity Commission considered discrimination on the basis of sexual orientation to be within its jurisdiction from its earliest years.[152] The EEOC only reversed its position in 1975 in the wake of a powerful anti-gay movement in the United States.[153] The union local, massage, and prison cases show the longstanding interpretation that sex discrimination includes decisions based on whether someone has the "same sex" as or "opposite sex" of another person. And the plaintiffs' action in *Singer* along with the Eagle Forum's response to the case show early history of interpreting discrimination "on account of sex" to encompass discrimination on the basis of sexual orientation.

The County argues further that "[t]he text of Title VII does not include sexual orientation or homosexuality as a protected class. . . ."[154] This argument has weak and strong forms. The weak form is merely that "sexual orientation" and "sex" are different words. The text of Title VII includes "sex" but not "sexual orientation," so it does not address sexual orientation.

Bostock's response is simple. First, Title VII does not protect classes; it protects each individual against discrimination because of such individual's sex. Second, "harassment" and "sex" are different words, and "miscegenation" and "race" are different words. But Title VII protects individuals against sexual harassment and against adverse employment decisions based on their interracial relationships. Title VII's terms are broad. They capture any decision regarding an individual that utilizes prohibited classifications, including having the "same sex" as or the "opposite sex" of another person.

The strong form of the argument is that same sex relationships are so profoundly different that "because of sex" means one thing for them and something completely different for same sex union locals,

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involved here. It specifically prohibits discrimination based on race, color, religion, sex, or national origin.") (emphasis omitted).

150. *See, e.g., id.* at 185–86; J.S.K. Enters., Inc. v. City of Lacey, 491 P.2d 600, 605 (Wash. Ct. App. 1971); *see also* Henry v. Milwaukee Cty., 539 F.3d 573, 588 (7th Cir. 2008) (Easterbrook, C.J., concurring) ("If this sort of justification had been advanced for matching the race of the inmates and the guards . . . courts would not go along. . . . Why then should courts accept the same sort of 'justification' for sex discrimination?").

151. *See* Respondent's Brief in Opposition to Petition for Writ of Certiorari at 30, Bostock v. Clayton Cty., No. 17-1618 (U.S. Aug. 10, 2018).

152. *See* Brief of Historians as Amici Curiae in Support of Employees at 23–25, Bostock v. Clayton Cty., No. 17-1618 (U.S. July 3, 2019).

153. *See id.* at 35–37.

154. Brief for Respondent, *supra* note 5, at 1.

same sex massages, and same sex supervision. The meaning depends on non-textual factors like purpose, intent, expected applications, or the like. Ben Franklin expounded this anti-textualist view: "Such is the imperfection of our language, and perhaps of all other languages, that, notwithstanding we are furnished with dictionaries innumerable, we cannot precisely know the import of words, unless we know of what party the man is that uses them."[155] Assigning a party and its viewpoint to Title VII would be a deeply normative endeavor. A textualist would entertain only the weak version of the argument, which is unconvincing.

Finally, Clayton County and its supporters challenge Bostock's application of "because of" causation. Bostock claims that the County discriminated against him because of his sex since it would not have fired him had he been a woman attracted to men.[156] The County responds that this claim changes two factors: not only his sex to female but also his (now her) sexual orientation to heterosexual. His (now her) sexual orientation must remain the same, because "that is the very trait that is the subject of this case."[157] To isolate sex, therefore, he must be compared to a lesbian. Employers who fire both homosexuals and lesbians do not discriminate on the basis of sex. "Neither sex is favored over the other."[158]

This argument is deeply flawed. Title VII protects individuals, not genders. The employer's subjective framing of the grounds for its decision—such as fear of Title VII liability, willingness to provide sexual consideration, or attitude toward same-sex orientation—is irrelevant to causation under Title VII. And Bostock does not have to show that the County's discriminatory policy depends on a "trait" that is "peculiar to one of the genders. That a rule, regulation, practice, or policy is applied on the basis of gender is alone sufficient for a finding of sex discrimination."[159]

Moreover, the same formal argument would apply in the massage parlor and prison cases. Remember a masseuse who challenges an ordinance forbidding opposite sex massages. She argues that if she were male, she could legally massage males. The city objects that her comparison changes two factors: her sex from female to male, and the "bisexuality" of the massage to "monosexuality." The city explains

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155. 3 BENJAMIN FRANKLIN, Preface to the Speech of Joseph Galloway on the Subject of a Petition to the King for Changing the Proprietary Government of Pennsylvania to a Royal Government (1764), *in* THE COMPLETE WORKS OF BENJAMIN FRANKLIN 310, 318 (John Bigelow ed., 1887), https://hdl.handle.net/2027/hvd.hwb4bv?urlappend=%3Bseq=340.

156. *See* Brief for Petitioner at 13–15, Bostock v. Clayton Cty., No. 17-1618 (U.S. Jun. 26, 2019).

157. Brief for Respondent, *supra* note 5, at 28.

158. Brief for Petitioners Altitude Express, Inc., and Ray Maynard at 9, Altitude Express, Inc. v. Zarda, No. 17-623 (U.S. Aug. 16, 2019).

159. Williams v. Saxbe, 413 F. Supp. 654, 658 (D.D.C. 1976), *vacated sub nom.* Williams v. Bell, 587 F.2d 1240 (D.C. Cir. 1978), *on remand*, Williams v. Civiletti, 487 F. Supp. 1387, 1389 (D.D.C. 1980) (finding discrimination because of sex).

that the very aim of the ordinance is the "too intimate familiarity of the sexes"[160] in a "bisexual" massage. Therefore the comparison must change only her sex while maintaining the "bisexuality" of the massage. The correct comparator is a masseur massaging a female, which the ordinance also prohibits. The city triumphantly concludes that its ordinance treats both sexes equally.

This argument fails for massagists, prison guards, and everyone else, as *Dothard v. Rawlinson* and *J.S.K. Enterprises, Inc. v. City of Lacey* make clear. The City of Lacey's subjective fear of intimate familiarity between members of the opposite sex and Clayton County's fear of intimate familiarity between members of the same sex are irrelevant. In the cases discussed above the city or employer utilized sex-based classifications and therefore discriminated because of the sex of the massagists, the guards, or Bostock. You cannot remove the employee's sex from the "bisexuality" of the massage, the "bisexuality" of females guarding males, or the homosexuality of Bostock's relationships.[161]

Title VII is not limited to the "equal" right to guard only your own sex or to love only the opposite sex. Only in a world of *Plessy v. Ferguson* is Clayton County an equal opportunity employer.

VII. CONCLUSION

The text of Title VII supports Bostock's claim, and the Supreme Court's landmark discrimination decisions are consistent with the claim's textual grounds. Of course other dictionary definitions and public uses of Title VII's terms might support Clayton County's position, undermining textualism as an interpretive theory. Regardless of the Justices' views of textualism, however, *Rawlinson*, its progeny and the decisions that anticipated it control the case. Title VII applies to classifications, not classes. It protects individuals, not genders. Classifications like "same sex" and "opposite sex" explicitly discriminate because of each individual employee's sex.

The Court should reaffirm *Brown*, *Loving*, and *Rawlinson*, rule that discrimination against a homosexual is discrimination because of his sex, and disapprove of the reasoning but not results in *Braunstein*, *Aldred* and *Wigginson*. The Court should also reaffirm the constitutional right to privacy and leave the balancing of individual and governmental interests that compete with Title VII, including privacy and the police power, to congressional legislation or further development by lower courts.

160. *See* cases cited *supra* note 59 and accompanying text.

161. *See, e.g.*, Reply Brief for Respondents, *supra* note 142, at 5 ("[W]hen a rule explicitly looks to the 'opposite sex' (as in *Dothard*) or the 'same sex' (as here), sex discrimination is baked into the rule itself.").