No. 18-13592

In the United States Court of Appeals for the Eleventh Circuit

DREW ADAMS,
A MINOR, BY AND THROUGH HIS NEXT FRIEND AND MOTHER,
ERICA ADAMS KASPER,
Plaintiff-Appellee,

v.

SCHOOL BOARD OF ST. JOHNS COUNTY, FLORIDA,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA, JACKSONVILLE DIVISION DISTRICT COURT CASE NO. 3:17-CV-00739-TJC-JBT

EN BANC BRIEF OF HISTORIANS AS AMICI CURIAE IN SUPPORT OF THE PLAINTIFF-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26-1, 28-1, and 29-2, counsel for amici certify that they believe the Certificate of Interested Persons (CIP) filed by defendant-appellant in its en banc brief on October 26, 2021 is correct and complete, subject to the amendments set forth in the CIPs filed by other amici since that time and subject to the following further amendments:

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The undersigned will enter this information in the Court's web-based CIP contemporaneously with filing this Certificate. As amici appear as individuals, no corporate disclosure statement is required.

/s/ Chanakya A. Sethi
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STATEMENT OF ISSUES

The Court requested briefing on whether the school district's policy of assigning bathrooms based on sex violates Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.*

INTEREST OF AMICI CURIAE

Amici are well-recognized academic historians whose many decades of scholarly study and research focus on the history of gender, sexuality, and law in the United States.[*] The appendix summarizes the qualifications and affiliations of the individual amici. Amici file this brief solely as individuals; institutional affiliations are given for identification purposes only.

Amici aim to provide the Court with accurate historical perspective as it considers the second question presented in this case: whether the school district's exclusion of Mr. Adams from the boys' restroom at school violates Title IX's ban on discrimination "on the basis of sex." 20 U.S.C. § 1681(a). Amici

[*] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici curiae affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

have examined the panel opinions, including the dissent's claim that public understandings of "sex" at the time of Title IX's enactment in 1972 preclude the conclusion that the law's bar on sex discrimination could have extended to transgender persons on account of their gender identity.[1] The school board and other amici have embraced similar arguments.[2] As professional scholars who have dedicated their careers to the study of the history of gender, sexuality, and law, amici find this assertion to be unsupported by the historical evidence.

SUMMARY OF ARGUMENT

Historical evidence from the decade leading to Title IX's enactment shows that public understandings of the word "sex" were then, as they are now, sufficiently broad and multidimensional for a bar on discrimination "on the basis of sex" to encompass gender identity and, more broadly, a person's identity as gay, lesbian, bisexual, or transgender (LGBT). Popular and official interpretations of the term "sex" in the parallel context of Title VII refute the

[1] *See Adams v. Sch. Bd. of St. Johns Cty., Fla.*, 3 F.4th 1299, 1336 (11th Cir. 2021) (W. Pryor, C.J., dissenting).

[2] *See* En Banc Br. for School Board 23–24; En Banc Br. for State of Tenn. et al. as Amici Curiae 6.

claim that discrimination "on the basis of sex" could not have included discrimination against LGBT people.

I. In 1972, when Title IX was enacted, the term "sex" encompassed not only "biological sex,"[3] but also a variety of social meanings linked to both sexual and gender identity. It evoked a range of sex roles, sexual expressions, and sexual instincts that shaped public knowledge about LGBT individuals in the 1960s and 1970s. Only later, in the mid-1970s to 1980s, did scholars begin to use the term "gender" to distinguish between socially constructed identity and one's sex assigned at birth.

II. Consistent with the public's capacious understandings of "sex" in the 1960s, early popular and official interpretations of Title VII, on which Title IX was based, made room for gay and transgender individuals as potential claimants under the statute. These interpretations show that Title VII was understood to prohibit not only discrimination on the basis of an individual's sex assigned at birth, but also broader attempts to enforce compliance with conventional sex stereotypes in the workplace. Recognizing the expansive

[3] *Adams*, 3 F.4th at 1322 (W. Pryor, C.J., dissenting).

possibilities of a broad prohibition on "sex"-based discrimination, LGBT claimants began bringing sex discrimination complaints under Title VII and EEOC officials sometimes encouraged them to do so.

III. Not until 1975, three years after Title IX's enactment and in the context of growing opposition to women's and LGBT rights, did the EEOC move to exclude LGBT claimants from its sex discrimination provision. As gay and transgender people increasingly entered public view in the early 1970s, the protections against sex discrimination in the ERA, Title VII amendments, and Title IX alarmed opponents of these laws. Amid this growing backlash, the EEOC backtracked from its more generous earlier treatment of LGBT claimants under Title VII. Some jurists have embraced that later interpretation as faithfully reflecting the original public meaning of Title VII and Title IX. But that later interpretation was an invented tradition, developed well after these laws' passage and obscuring broader prior interpretations.

ARGUMENT

The panel dissent, and jurists in related cases, reasoned that public understandings of "sex" at the time Title IX was enacted preclude the conclusion that the bar on discrimination "on the basis of sex," 20 U.S.C. § 1681(a), could have extended to LGBT persons, and transgender persons in particular.[4] Indeed, the panel dissent unequivocally declared that "'sex' has never meant gender identity."[5] But that conclusion is flawed. At the time of Title IX's enactment, public understandings of the word "sex" encompassed not only the male and female sex as assigned at birth but also a range of social norms associated with masculinity and femininity.

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[4] *See Adams*, 3 F.4th at 1336 (W. Pryor, C.J., dissenting); *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 632-33 (4th Cir. 2020) (Niemeyer, J., concurring in part and dissenting in part); *see also Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 144–45 (2d Cir. 2018) (en banc) (Lynch, J., dissenting) (similar reasoning in the context of Title VII); *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 362–63 (7th Cir. 2017) (en banc) (Sykes, J., dissenting) (same); *Wittmer v. Phillips 66 Co.*, 915 F.3d 328, 333–34 (5th Cir. 2019) (Ho, J., concurring) (same); *cf. Bostock v. Clayton Cty., Georgia*, 140 S. Ct. 1731, 1743 (2020) (holding Title VII bars "discriminat[ion] against employees for being homosexual or *transgender*") (emphasis added).

[5] *Adams*, 3 F.4th at 1336 (W. Pryor, C.J., dissenting).

Such understandings are vividly illustrated in reactions to Title VII—which, of course, was foundational to the crafting of Title IX.[6] Popular and legal discussions of Title VII, as well as early complaints filed with the Equal Employment Opportunity Commission (EEOC), reveal that both supporters and opponents of LGBT rights understood that the law potentially covered LGBT individuals, including transgender individuals.

I. THE DECADE BEFORE TITLE IX'S PASSAGE FEATURED A BROAD RANGE OF PUBLIC MEANINGS OF THE WORD 'SEX'

The dissent claims that public understandings of "sex" at the time of Title IX's enactment did not extend to "gender identity" and so could not encompass protections of transgender persons.[7] In fact, the historical record reveals that public conceptions of "sex" in these years were wide-ranging and included considerations of gender identity, sex role, and sexual orientation.

1. When Title IX was enacted in 1972, as today, the word "sex" encompassed a variety of social meanings. Both public and scientific discourse employed "sex" expansively, as an adjective and a noun, to invoke sexual desire, conduct, and social roles, as well as to refer to the male sex and female

[6] *See, e.g.*, *N. Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 523–29 (1982) (discussing the legislative history of Title IX and influence of Title VII).

[7] *Adams*, 3 F.4th at 1336 (W. Pryor, C.J., dissenting).

sex. Because "the concept of socially constructed sex differences did not have a word [like gender] to connote it," social scientists in the 1950s and early 1960s used the term "sex roles" to describe culturally- or conventionally-defined behaviors expected of men and women, and psychologists used "psychological sex" and sometimes "sex-role identification" to mean what we today call "gender identity."[8]

Then-contemporary dictionaries give a rough indication of the word's broad reach. Although dictionary definitions often incompletely reflect usage, the five listed definitions of "sex" in the influential Random House unabridged dictionary of 1966 are indicative:

> 1. the fact or character of being either male or female ….
>
> 2. either of the two groups of persons exhibiting this character ….
>
> 3. the sum of structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences.
>
> 4. the instinct or attraction drawing one sex toward another, or its manifestations in life and conduct.

[8] Joanne Meyerowitz, *A History of 'Gender,'* 113 Am. Hist. Rev. 1346, 1353–54 (2008).

5. coitus. …[9]

The third definition, in stressing "behavior," denotes the range of social habits and characteristics—that is, sex roles—associated with men and women. The fourth, in identifying "manifestations" of sexual "instinct" in "life or conduct," encompasses a broad constellation of sex-related practices, desires, and experiences. The 1961 edition of the *Oxford English Dictionary*, the authoritative reference on English usage over time, is in accord, defining the term "sex" as invoking not simply male and female organisms, but also the whole "class of phenomena with which [the differences between male and female] are concerned."[10] This understanding of the term "sex" was consistent throughout the 1960s, as the 1969 edition of the American Heritage Dictionary demonstrates in defining "sex" as "the physiological, *functional*, and *psychological* differences that distinguish the male and the female."[11]

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[9] "Sex," *Random House Dictionary of the English Language* (Unabridged ed. 1966); *cf.* William N. Eskridge, Jr., *Title VII's History and the Sex Discrimination Argument for LGBT Workplace Protections*, 127 Yale L.J. 246, 347–52 (2017).

[10] "Sex," *Oxford English Dictionary* (vol. IX 1961).

[11] "Sex," *The American Heritage Dictionary of the English Language* (1969) (emphasis added).

Only later, in the mid-1970s to 1980s, did scholars begin to use the term "gender" to distinguish between socially constructed identity and sex assigned at birth.[12] As one scholar wrote in 1979, urging colleagues to adopt a more precise linguistic distinction between the two concepts: "The term gender is *introduced* for those characteristics and traits socioculturally considered appropriate to males and females."[13]

2. These broad understandings of sex, as evoking a range of sex roles, sexual expressions, and sexual instincts, shaped public knowledge about LGBT individuals in the 1960s and 1970s. Indeed, the confluence of those ideas has a longer historical genealogy. As early as the turn of the twentieth century, researchers and popular writers explicitly identified homosexuals—a conceptual category that at that time included individuals who identified with another sex—as an "intermediate sex" or "third sex," blending elements of

[12] *See, e.g.*, Meyerowitz, *supra* note 8 at 1346–47, 1354–55.

[13] Rhoda Kesler Unger, *Toward a Redefinition of Sex and Gender*, 34 Am. Psych. 1085, 1085 (1979) (emphasis added).

both male and female.[14] Although the idea of a third sex began to lose prominence by midcentury,[15] the association between homosexuality, transgender identity, and gender nonconformity lingered well into the 1960s and 1970s. Sexologists sometimes grouped LGBT people as "sex variants"—a term introduced by psychiatrist George Henry primarily to mean homosexuals, but also individuals who identified with a different gender, as well as those who engaged in gender-nonconforming behaviors.[16] In the 1950s and 1960s, the term "sex variants" circulated beyond the medical profession, sometimes appearing in popular media to designate homosexual or transgender persons.[17]

In addition to "sex variants," transgender people during these years were commonly referred to as "transsexuals," and the language of "sex

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[14] *Sexology Uncensored: The Documents of Sexual Science* 39–72 (Lucy Bland & Laura Down eds. 1998).

[15] *But see* Anna Lvovsky, *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life before Stonewall* 119 (2021) (trial judge describing homosexual defendant as "third sex" in 1956).

[16] Henry L. Minton, *Departing from Deviance: A History of Homosexual Rights and Emancipatory Science in America* 58–64 (2002). *See also* George W. Henry, *Sex Variants: A Study of Homosexual Patterns* 6, 11–14, 554, 557–58, 560 (1948).

[17] *See, e.g.*, Walter Alvarez, *Blameless Sex Variants*, Minneapolis Star, Sept. 20, 1965, at 23; Paul Popenoe, *Female Acting Roles Wrong from Boys*, Morning Call, Feb. 17, 1965, at 39.

change" relied on the word "sex" to designate transgender experience. Consider the story of former GI Christine Jorgensen. In December 1952, the *New York Daily News* broke the story of Jorgensen's "sex change" surgery.[18] Media attention—including Jorgensen's own five-part autobiographical account, published in the nationally syndicated Sunday magazine *American Weekly*—continued for years afterward.[19] By 1966, when Harry Benjamin published his foundational book, *The Transsexual Phenomenon*, the idea of a "sex change" was widespread and Jorgensen was a household name.[20]

In short, in the years leading up to Title IX's passage, the public's understandings of the concept of "sex" were far broader than the dissent suggested.

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[18] *Ex-GI Becomes Blonde Beauty*, N.Y. Daily News, Dec. 1, 1952.

[19] Christine Jorgensen, *The Story of My Life*, Am. Weekly, Feb. 15, 22, Mar. 1, 8 & 15, 1953; *see also* Joanne Meyerowitz, *How Sex Changed: A History of Transsexuality in the United States* 64–66 (1980).

[20] Harry Benjamin, *The Transsexual Phenomenon* (1966).

II. EARLY INTERPRETATIONS OF TITLE VII, ON WHICH TITLE IX WAS BASED, MADE ROOM FOR LGBT INDIVIDUALS AS POTENTIAL CLAIMANTS

The public's broad definitions of sex in the 1960s, as encompassing both a person's identity as male or female and the characteristics and cultural practices associated with being a man or woman, governed early understandings of Title VII's bar on discrimination "because of … sex." 42 U.S.C. § 2000e-2(a)(1). Courts have recognized that Title VII is the "paradigmatic anti-discrimination law," and that interpretations of Title VII can thus be "illuminating" in understanding the provisions of Title IX.[21] Indeed, Title IX was enacted in the same year that Congress passed a series of amendments to Title VII to clarify that sex discrimination was "no less serious than other prohibited forms of discrimination" such as that based on race.[22] Senator Birch Bayh, Title IX's legislative champion, remarked during legislative deliberations that Title IX's various provisions sought to close "loopholes in the [1964]

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[21] *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616-17 & n. 1 (1999) (Thomas, J., dissenting) (collecting cases); *see also Preston v. Com. of Va. ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206–07 (4th Cir. 1994) (collecting cases).

[22] S. Rep. No. 92-415, 92d Cong., 1st Sess. 7 (1971); *see also* H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4–5 (1971); Serena Mayeri, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* 55–56 (2011).

Civil Rights Act where sex was not mentioned" by drawing from the "extremely effective" provisions of Title VII.[23] A review of the historical use and public understandings of "sex" in the Title VII context can therefore help interpret the reach of Title IX.

A. Title VII's Protections Against 'Sex' Discrimination in Employment Were Understood To Prohibit Enforced Conformity to Sex-Role Expectations

Consistent with the public's capacious understandings of "sex" in the 1960s, Title VII was understood in both popular and legal interpretations to prohibit not only discrimination on the basis of one's sex assigned at birth, but also broader attempts to enforce compliance with conventional sex stereotypes in the workplace.

1. The precise meaning of "sex discrimination" was not immediately evident following Title VII's passage, in part because that term was not a well-established legal concept and Title VII itself was not rigorously enforced upon its enactment.[24] From the beginning, however, the paradigmatic instances of discrimination "because of … sex" in EEOC complaints and federal lawsuits

[23] 118 Cong. Rec. 5807–08 (1972).

[24] Alice Kessler-Harris, *In Pursuit of Equity: Women, Men, and the Quest for Economic Citizenship in 20th-Century America* 246–66 (2001); John D. Skrentny, *The Minority Rights Revolution* 111–19 (2002).

concerned the imposition of gender norms in the workplace. Core examples included employers holding female employees to conventional standards of female attractiveness, such as youth, slenderness, and unmarried status.[25] Some observers, including some EEOC officials, immediately understood these practices to violate Title VII because they imposed sex-based stereotypes about the type of work men and women should do, or how men or (especially) women ought to look and behave.

Early press coverage warned that Title VII's prohibition on sex discrimination would produce masculinized women and feminized men. Days before the Civil Rights Act took effect, a *Wall Street Journal* reporter imagined the parade of horribles that would result:

> A shapeless, knobby-kneed male "bunny" serving drinks to a group of stunned business men in a Playboy Club.
>
> A matronly vice president gleefully participating in an old office sport by chasing a male secretary around a big leather-topped desk.
>
> A black-jacketed truck driver skillfully maneuvering a giant rig into a dime-sized dock space—and then

[25] *See, e.g.*, *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1196–97 (7th Cir. 1971); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386 (5th Cir. 1971).

> checking her lipstick in the rear-view mirror before hopping out.[26]

Fear and ridicule littered coverage of the potential consequences of Title VII's sex provision. Critical commentators jeered the so-called "bunny problem"—the specter of men being hired as Playboy bunnies.[27] Businessmen balked at the idea of female pilots and locomotive engineers, or male "stewardesses."[28] Immediately after Title VII's enactment, *The New York Times* published a scathing editorial titled *De-Sexing the Job Market*, contending that perhaps "it would have been better if Congress had just abolished sex itself" and calling Title VII's ban on sex discrimination "revolution, chaos."[29]

These commentaries reflected anxieties that Title VII would upend familiar norms of masculinity and femininity, disrupting traditional distinctions between the roles usually played by men and women in the workplace. But the EEOC saw Title VII as aimed at this very result. Even in the early period of sluggish enforcement the EEOC deputy general counsel declared: "The

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[26] *Sex & Employment: New Hiring Law Seen Bringing More Jobs, Benefits for Women*, Wall St. J., June 22, 1965, at 1.

[27] *A New Worry, Bunnies*, St. Louis Post-Dispatch, Aug. 27, 1965, at 16.

[28] *See, e.g.*, *ibid.*; Arelo Sederberg, *Civil Rights for Women Pose Business Headache*, L.A. Times, Oct. 6, 1964; John Herbers, *For Instance, Can She Pitch for the Mets?*, N.Y. Times, Aug. 20, 1965, at 1.

[29] *De-Sexing the Job Market*, N.Y. Times, Aug. 21, 1965, at 20.

Commission is going to put the burden on the employers. If they can't think of any reason not to [hire women for jobs traditionally held by men], they'd better do it."[30] Even the "bunny problem," he suggested, did not "obvious[ly]" merit an exception to Title VII's requirement.[31] Sure enough, the EEOC's earliest guidelines, issued in 1965, included as a violation "[t]he refusal to hire an individual based on stereotyped characterizations of the sexes."[32]

2. This expansive understanding of sex-based discrimination governed early judicial encounters with Title VII. By 1971, federal courts recognized that a core principle behind Title VII's sex discrimination ban was to allow employees to depart from conventional norms of masculinity or femininity without facing workplace exclusion or penalty. In *Phillips* v. *Martin-Marietta Corporation*, for example, the Supreme Court invalidated a company's exclusion of women with pre-school-aged children from certain job categories, recognizing that the employer had not justified the exclusion of a particular subset of women based on a sex-based stereotype—that women

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[30] *The Burden of the Bunnies*, Det. Free Press, Aug. 23, 1965, at 6.

[31] *Ibid.*

[32] EEOC Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14926, 14927 (Dec. 2, 1965) (codified as amended 29 C.F.R. § 1604.2(a)(1)(ii)).

with young children belong at home and are not reliable workers.[33] Complainants also succeeded when they challenged airlines for imposing sex-based age, weight, and marital-status restrictions on female stewardesses. Because these hiring practices unlawfully enforced conformity to conventional norms of femininity, the courts found that they violated Title VII.[34]

In sum, far from being restricted to distinctions based on one's sex assigned at birth, Title VII's bar on sex discrimination was promptly interpreted to prohibit enforced compliance with traditional gender norms and sex roles.

B. LGBT Claimants Brought Sex Discrimination Complaints under Title VII and EEOC Officials Sometimes Encouraged Them

As the Supreme Court recently observed, "[n]ot long after the law's passage, gay and transgender employees began filing Title VII complaints," recognizing the expansive possibilities of Title VII's bar on sex discrimination to cover discrimination based on sexual and gender identity.[35] Some officials at the EEOC encouraged such complaints, and some expressly opined that LGBT individuals were covered under Title VII.

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[33] *See, e.g.*, *Phillips v. Martin-Marietta Corp.*, 400 U.S. 542 (1971) (per curiam); *see also Diaz*, 442 F.2d 385.

[34] *See, e.g.*, *Diaz*, 442 F.2d 385.

[35] *Bostock*, 140 S. Ct. at 1750 (collecting cases).

1. Upon Title VII's enactment in 1964, some LGBT people saw themselves in its sex discrimination prohibition and began requesting EEOC assistance. It is remarkable that they brought their claims to a government office at all. Most gay and transgender people in these years did not seek legal redress for mistreatment, because they expected from the law not protection, but rather exposure and punishment. The punitive purge of gays and lesbians from the federal civil service had only recently ended.[36] LGBT people, especially gender non-conforming individuals, faced routine harassment from police.[37] That some claimants still sought help from the EEOC underscores how powerfully the word "sex," and the bar on sex-based discrimination, communicated the possibility of protection.

2. Despite uneven initial responses, by the early 1970s the EEOC grew more receptive to LGBT individuals' Title VII complaints. In 1971, an advocacy organization for transgender individuals reported on two cases from California and Georgia in which transgender people received EEOC guidance

[36] *See generally* David K. Johnson, *The Lavender Scare: The Cold War Persecution of Gays and Lesbians in The Federal Government* (2004).

[37] Timothy Stewart-Winter, *Queer Clout: Chicago and the Rise of Gay Politics* 16–25, 41–57, 68–89 (2016); Lvovsky, *supra* note 15 at 107–08.

on submitting Title VII claims.[38] The group assured transgender individuals that the law applied "to transsexuals who are seeking employment and to those whose employment is terminated following sex reassignment surgery, where the individual's work was previously considered satisfactory."[39] A 1971 *Cornell Law Review* article confirmed that when "[a] Georgia transsexual allegedly encountered job discrimination after reassignment surgery," the EEOC "offered its assistance if the problem should arise again."[40]

Equally telling evidence that EEOC officials processed transgender persons' Title VII complaints appears in a 1972 "Final Decision Cover Sheet" located in EEOC records. These records are one-page summaries that provide basic case information, including complainants' and employers' names, decision dates, the agency's findings (cause/no cause), and brief notations of the adverse employment actions cited. In one case, the EEOC investigated a transgender person's complaint that their termination violated Title VII's sex discrimination prohibition. The Commissioners rendered their final decision

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[38] *Legal Aspects of Transsexualism and Information on Administrative Procedures*, Erickson Educ. Found., rev. ed. July 1971, at 11.

[39] *Id.* at 11–12.

[40] Comment, *Transsexualism, Sex Reassignment Surgery, and the Law*, 56 Cornell L. Rev. 963, 1003 n.265 (1971).

as: "No Cause/sex (transsexual) – discharge."[41] Although the EEOC declined to take further action, its finding of "no cause" suggests that the agency treated transgender identity as directly within Title VII's purview. Significantly, the "no cause" decision is distinguishable from decisions of "non-jurisdiction" attached to complaints that were not timely filed, or involved employers not covered by the law, or otherwise were beyond the EEOC's legal authority. Instead, it is similar to other "no cause" sheets for classifications undoubtedly covered by federal law that read "NO CAUSE/race (Negro)"[42] and "No Cause/Sex (Female)."[43] The way the finding is written—"No Cause/sex (transsexual)"—suggests that the EEOC treated "transsexuality" as parallel to discrimination claims based on "sex."

3. The public's broad understandings of "sex," and contemporary association of LGBT individuals with gender nonconformity, meant that some

[41] *E.B. v. Twin City Milk Prods. Ass'n*, No. 72-1394 (EEOC Mar. 8, 1972) (on file with National Archives, College Park, Md.).

[42] *V.L. v. Safeway Stores*, No. 72-1395 (EEOC Mar. 17, 1972) (on file with National Archives, College Park, Md.).

[43] *E.H. v. Nat'l Biscuit Co.*, No. 72-1447 (EEOC Mar. 23, 1972) (on file with National Archives, College Park, Md.).

EEOC officials also extended Title VII protections to gay and lesbian individuals. In 1971, for example, the lesbian activist Del Martin wrote to colleagues about her meeting with EEOC general counsel Stanley Haber:

> The EEOC office took our names and addresses and said they would send us documents on policy and procedure. We were told we had at least two options: (1) to gather as much specific data as possible on job discrimination as it pertains to homosexuals and present our case directly to the commissioners for a determination, or (2) have individuals file complaints with their local offices.[44]

Some LGBT individuals took the general counsel's advice. In 1972, for example, one man sent simultaneous queries to two regional EEOC offices asking whether Title VII covered "homosexuality." He received two answers: One office declared that Title VII prohibited employment discrimination based on sex, "therefore covering homosexual."[45] The second office disagreed, saying that homosexuality was "not within the generic classification specified in the law," and noting "no Commission guidelines" specifying its inclusion.[46] The

[44] Letter from Del Martin to Council on Religion & the Homosexual (May 20, 1971) (on file with the GLBT Historical Society, San Francisco).

[45] Letter from Miriam Mimms, EEOC to Joel Starkey (Oct. 28, 1972) (on file with Frank Kameny Papers, Library of Congress).

[46] Letter from Jose Lopez, EEOC to Joel Starkey (Oct. 25, 1972) (on file with Frank Kameny Papers, Library of Congress).

official cited what he called the "legislative history" of Title VII, suggesting that "sex refers to gender male/female"—thus echoing the conflation of the terms "sex" and "gender"—while homosexuality "is sexual activity."[47] Although contradicting the first, this second letter is striking for its resort to (an invented) legislative history rather than to agency guidelines.[48] Without any official EEOC position, some regional offices saw "homosexuality" as covered by Title VII.

Some officials in the EEOC's national office, too, saw discrimination "because of … sex" as encompassing diverse sexual meanings. Sonia Pressman Fuentes of the General Counsel's Office endorsed broad Title VII coverage at a 1971 seminar, as reported in an activists' newsletter. Fuentes declared that the EEOC "interprets sex to mean both sexual identity and sexual orientation."[49] She added that "if a case of discrimination involving homosexuality

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[47] *Ibid.* It is also worth noting while this EEOC official distinguished between gender and homosexual activity, that logic does not apply to transgender individuals, who would fall into the former category.

[48] *Cf. Bostock*, 140 S. Ct. at 1752 (noting "meager legislative history" of Title VII).

[49] *Unexpected Support*, Homophile Action League Newsl. (Homophile Action League, Phila., Pa.), Jan. 26, 1971, at 2–3.

were to come before the Commission which had gone through the proper channels and which was found to be valid, the Commission would definitely prosecute the discriminator."[50] The newsletter reported no disagreement with Fuentes's interpretation from fellow panelists, who included the director of the U.S. Commission on Civil Rights and the head of Cleveland's regional EEOC office.[51]

More corroboration of the EEOC's sympathy toward LGBT complainants came two years later, when the General Counsel's Office informed Frank Kameny, the liaison between D.C.'s gay activist community and the EEOC, that it viewed discrimination against homosexual employees as within the agency's ambit. Writing in 1974 to attorneys representing an EEOC clerk fired for homosexuality by the Civil Service Commission, Kameny reported that the General Counsel's Office was "embarrassed" by the man's firing, seeing it as "a violation by the government of everything that the EEOC is trying to accomplish and for which it stands."[52]

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[50] *Ibid.*

[51] *Ibid.*

[52] Letter from Frank Kameny to Arnold Pedowitz & Ronald Kessler (Aug. 29, 1974) (on file with Frank Kameny Papers, Library of Congress).

As this history reveals, the panel dissent's claim that "'sex' never meant gender identity" is belied by both public and official interpretations of sex discrimination laws at the time of Title IX's enactment. Consistent with the public's capacious understandings of "sex" as connoting not just an individual's sex assigned at birth but also a broad range of gender-based norms, roles, and identities, litigants and EEOC officials alike sometimes interpreted Title VII's "because of … sex" provision to prohibit discrimination against LGBT individuals.

III. ONLY IN 1975, AGAINST A BACKDROP OF GROWING OPPOSITION TO WOMEN'S AND LGBT RIGHTS, DID THE EEOC MOVE TO EXCLUDE LGBT CLAIMANTS FROM TITLE VII'S SEX DISCRIMINATION PROVISION

Only in 1975—three years after Title IX's enactment—did EEOC officials and judges move formally to narrow the scope of Title VII's sex discrimination provision, excluding LGBT claimants. This shift occurred against a backdrop of growing political opposition to LGBT and women's rights.

1. Although LGBT individuals were far from absent from public discussions when Congress passed the 1964 Civil Rights Act, by the early 1970s gay and transgender people moved fully into public view. The early 1970s featured the first gay pride parades, numerous organizations supporting

transgender people, campaigns for local gay rights ordinances, professional caucuses of gay librarians, social workers, nurses, and academics, and growth in openly gay businesses and neighborhoods in American cities.[53]

As political movements for LGBT liberation sprang up alongside movements for women's rights, their shared challenge to conventional sex roles became increasingly plain. As one activist wrote in 1971, "Gay liberation is a struggle against sexism."[54] Another asserted that a "'real man' and 'real woman' are not so by their chromosomes and genitals, but by their respective degrees of 'masculinity' and 'femininity,' and by how closely they follow the sex-role script in their relationships with individuals and society."[55] Lesbian and bisexual women activists identified the connections between female and

[53] *See* John D'Emilio & Estelle B. Freedman, *Intimate Matters: A History of Sexuality in America* ch. 13 (3d ed. 2012).

[54] Allen Young, *Out of The Closets, Into The Streets*, in *Out of the Closets: Voices of Gay Liberation* 7 (Karla Jay & Allen Young eds., 1972).

[55] *Gay Revolution and Sex Roles*, in Jay & Young, *id.* at 252. *See also* Chicago Gay Liberation, *Working Paper for the Revolutionary People's Constitutional Convention*, in Jay & Young, *id.* at 346 (calling for "the abolition of sex-role stereotypes").

gay liberation with particular poignancy, connecting "male supremacy" with "rigid sex roles" and "enforced … heterosexuality."[56]

Legal commentators echoed these views. The debate over the Equal Rights Amendment (ERA), which occurred contemporaneously with the 1972 amendment of Title VII and passage of Title IX, illustrates this connection. The ERA's proposed language—"which was strikingly similar to Title VII's"[57]—provided that neither states nor the federal government could abridge or deny "equality of rights under the law … on account of sex."[58] As with Title VII, the ERA's language inspired expansive visions of what "on account of sex" might cover. "Legal distinction on the basis of sex is no longer reasonable," remarked one lawyer to the American Bar Association about the ERA in 1970, "[a]nd I am willing to apply that view to any and all sets of circumstances the mind may conceive."[59] Eminent constitutional scholar and Harvard Law School professor Paul Freund drew a more direct connection to

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[56] Radicalesbians, *The Woman-Identified Woman*, in Jay & Young, *id.* at 172; Kate Millet, *Sexual Politics: A Manifesto for Revolution*, in *Radical Feminism* 367 (Anne Koedt et al. eds., 1973).

[57] *Bostock*, 140 S. Ct. at 1751.

[58] H.J. Res. 208, 86 Stat. 1523, 92d Cong., 2d Sess. (1972).

[59] Peggy Pascoe, *Sex, Gender, and Same-Sex Marriage*, in *Is Academic Feminism Dead? Theory in Practice* 89–90 (Social Justice Group ed. 2000) (citation omitted).

the legal status of LGBT persons in particular: "[I]f the law must be as undiscriminating concerning sex as it is toward race," he testified, "it would follow that the laws outlawing wedlock between members of the same sex would be as invalid as laws forbidding miscegenation."[60]

2. It was precisely the capaciousness of the ERA's protections that alarmed its opponents. Senator Sam Ervin, a prominent critic of the ERA, objected to the broad reach of a law prohibiting discrimination based on "sex," protesting that "the word sex is imprecise in its exact meaning."[61] Ervin was especially concerned about the possibility that the ERA, in abolishing all sex-based legal distinctions, would invalidate laws aimed at penalizing LGBT individuals. Citing Freund's testimony, Ervin introduced an amendment excluding from the ERA's coverage "any law prohibiting sexual activity between persons of the same sex or the marriage of persons of the same sex."[62]

Neither Ervin nor other critics stopped the momentum propelling the ERA. In a series of votes in 1972, Congress affirmed its commitment to broad

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[60] *Equal Rights 1970: Hearings on S.J. Res. 61 and S.J. Res. 231 Before the S. Comm. on the Judiciary*, 91st Cong., 2d Sess. 74–75 (1970).

[61] Pascoe, *supra* note 59 at 46 (citation omitted).

[62] 118 Cong. Rec. 9314 (1972); *see also Bostock*, 140 S. Ct. at 1751 (noting arguments during ERA debates that its language "might also protect homosexuals from discrimination").

anti-discrimination laws, including discrimination based on sex. The Senate defeated Ervin's effort to amend the ERA by a vote of 84-8 on March 22.[63] Two days later, Congress amended Title VII to cover a broader range of both private and public employers.[64] And that summer, Congress enacted Title IX.[65] But amid this flurry of legislation, Congress did nothing to narrow the scope of the term "sex" itself as used in either law.

Ervin had never been alone in opposing the ERA's inclusiveness, however, and before long political headwinds against women's and LGBT rights gained strength. Phyllis Schlafly's STOP ERA campaign, commenced in 1972, spread the idea that the ERA would mandate unisex bathrooms, legalize same-sex marriage, and subject women to the military draft.[66] And a loose coalition of anti-LGBT activists emerged, epitomized in Anita Bryant's 1977 "Save Our

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[63] Eileen Shanahan, *Equal Rights Amendment is Approved by Congress*, N.Y. Times, Mar. 23, 1972, at 1.

[64] Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (Mar. 24, 1972).

[65] Education Amendments of 1972 (Title IX), Pub. L. 92-318, 86 Stat. 373 (June 23, 1972).

[66] For the historical association between women's military service and lesbianism, *see* Margot Canaday, *The Straight State: Sexuality and Citizenship in Twentieth-Century America* ch. 5 (2009). For the linkage between the ERA and the drafting of women, *see* Thomas I. Emerson et al., *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 Yale L.J. 80 (1971).

Children" campaign, which fought to repeal an antidiscrimination ordinance in Florida.[67]

3. In the context of that backlash, the EEOC backtracked from its more generous earlier treatment of LGBT claimants under Title VII. In 1975, for the first time, the EEOC issued two "non-jurisdiction" opinions declaring that homosexuality was outside of Title VII's purview.[68] The same year, courts began to exclude transgender identity, gender presentation, and homosexuality from the definition of sex discrimination, drawing on speculations about Congressional intent.[69] That position became the so-called "common sense" interpretation that some jurists have pinned on Title VII and Title IX. But that interpretation was an invented tradition, developed well after these laws' passage and obscuring broader prior interpretations.[70]

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[67] D'Emilio & Freedman, *supra* note 53, at 346–47.

[68] EEOC Dec. No 76-67, 1975 WL 4475 (Nov. 21, 1975); EEOC Dec. No. 76-75, 1975 WL 342769 (Dec. 4, 1975).

[69] *See, e.g.*, *Smith v. Liberty Mut. Ins.*, 395 F. Supp. 1098 (N.D. Ga. 1975), *aff'd*, 569 F.2d 325 (5th Cir. 1978); *Voyles v. Ralph K. Davies Med. Ctr.*, 403 F. Supp. 456 (N.D. Cal. 1975).

[70] Cary Franklin, *Inventing the 'Traditional Concept' of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012).

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A close examination of popular and legal debates about sex discrimination in the decade leading to Title IX's passage reveals that public understandings of both "sex" and "sex"-based discrimination encompassed potential claims by LGBT individuals. Uses of "sex" as both noun and adjective in the parallel context of Title VII refute the claim that discrimination "on the basis of sex" could not have included discrimination against LGBT people, and transgender persons in particular. Legal arguments that rely on a contrary understanding should thus be rejected.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

By: /s/ Chanakya A. Sethi

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CERTIFICATION OF COMPLIANCE
WITH TYPEFACE AND WORD-COUNT LIMITATIONS

Pursuant to Fed. R. App. P. 32(g), the undersigned hereby certifies as follows:

1. Exclusive of the exempted portions of the brief as provided in Fed. R. App. P. 32(f), the brief (including the enclosed appendix) contains 6,471 words, consistent with the length limitation in Fed. R. App. P. 29(a)(5) and this Court's briefing notice of September 16, 2021.

2. The motion has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Century font, consistent with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. Rule 32(a)(6).

/s/ Chanakya A. Sethi
CHANAKYA A. SETHI

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was filed electronically with the Court's CM/ECF system on November 23, 2021. Service will be effectuated by the Court's electronic notification system upon all parties and counsel of record. I further certify that all parties required to be served have been served.

/s/ Chanakya A. Sethi
CHANAKYA A. SETHI

DATED: NOVEMBER 23, 2021

APPENDIX

APPENDIX: LIST OF AMICI CURIAE

Margot Canaday is Professor of History at Princeton University. Her first book, *The Straight State: Sexuality and Citizenship in Twentieth Century America* (2009), won seven prizes, including awards from the Association of American Law Schools, the American Society for Legal History, the Organization of American Historians, and the American Political Science Association. Canaday has won fellowships from the Social Science Research Council, the Princeton University Society of Fellows, the Radcliffe Institute for Advanced Study, the National Endowment for the Humanities, and the American Council of Learned Societies. She is currently completing a book on the history of LGBT people in the workplace.

Nancy F. Cott is the Jonathan Trumbull Research Professor of American History at Harvard University. She was elected a member of the American Academy of Arts and Sciences in 2008, and president of the Organization of American Historians in 2016–17. Her books include *The Bonds of Womanhood: 'Woman's Sphere' in New England, 1780–1835* (1977), *The Grounding of Modern Feminism* (1987), *Public Vows: A History of Marriage and The Nation* (2000), and *Fighting Words: The Bold American Journalists Who Brought the World Home Between the Wars* (2020).

Anna Lvovsky is Assistant Professor of Law at Harvard Law School. Her historical work focuses on the legal regulation of gender and sexuality in the twentieth century, with an emphasis on the policing of LGBT communities. Her first book, *Vice Patrol: Cops, Courts, and the Struggle over Urban Gay Life before Stonewall*, was recently released by the University of Chicago Press, and her articles have appeared in the Harvard Law Review, the Yale Law Journal, the University of Pennsylvania Law Review, and the Journal of Urban History. Previously, she was an Academic Fellow at Columbia Law School.

Serena Mayeri is Professor of Law and History at the University of Pennsylvania Law School. Her first book, *Reasoning from Race: Feminism, Law, and the Civil Rights Revolution* (2011), received prizes from the American Historical Association and the Organization of American Historians. Her scholarship has appeared in publications including the Yale Law Journal, the California Law Review, and Constitutional Commentary. Mayeri holds a secondary appointment in Penn's Department of History and serves on the executive boards of the Program on Gender, Sexuality, and Women's Studies and the Andrea Mitchell Center for the Study of Democracy.

Joanne Meyerowitz is the Arthur Unobskey Professor of History and American Studies at Yale University. She is past president of the Organization of American Historians (2019–20) and past editor of the Journal of American History (1999–2004). Her books include *How Sex Changed: A History of Transsexuality in the United States* (2002), which won the American Library Association's Stonewall Book Award for non-fiction, and the edited collection *Not June Cleaver: Women and Gender in Postwar America, 1945–1960* (1994). She has held fellowships from, among others, the American Council of Learned Societies, John Simon Guggenheim Foundation, National Humanities Center, Radcliffe Institute for Advanced Study, and Social Science Research Council.