DENNIS JACOBS, *Circuit Judge, concurring*:

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

I

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

First: this Circuit has already recognized associational discrimination as a Title VII violation. In Holcomb v. Iona Coll., 521 F.3d 130 (2d Cir. 2008), we

considered a claim of discrimination under Title VII by a white man who alleged that he was fired because of his marriage to a black woman. We held that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race . . . The reason is simple: where an employee is subjected to adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." Id. at 139 (emphasis in original).

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

Third: There is no reason I can see why associational discrimination based on sex would not encompass association between persons of the same sex. In Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998), a case in which a man alleged same-sex harassment, the Supreme Court stated that Title VII

prohibits "'discriminat[ion] . . . because of . . . sex'" and that Title VII "protects men as well as women." Id. at 79–80.

This line of cases, taken together, demonstrates that discrimination based on same-sex relationships is discrimination cognizable under Title VII notwithstanding that the sexual relationship is homosexual.

Zarda's complaint can be fairly read to allege discrimination based on his relationship with a person of the same sex. The allegation is analogous to the claim in Holcomb, in which a person of one race was discriminated against on the basis of race because he consorted with a person of a different race. In each instance, the basis for discrimination is disapproval and prejudice as to who is permitted to consort with whom, and the common feature is the sorting: one is the mixing of race and the other is the matching of sex.

This outcome is easy to analogize to Loving v. Virginia, 388 U.S. 1 (1967). While Loving was an Equal Protection challenge to Virginia's miscegenation law, the law was held unconstitutional because it impermissibly drew distinctions according to race. Id. at 10–11. In the context of a person consorting with a person of the same sex, the distinction is similarly drawn according to sex, and is therefore unlawful under Title VII.

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

Mr. Mortara also argues that discrimination based on homosexual acts and relationships is analytically distinct from discrimination against homosexuals, who have a proclivity on which they may or may not act. Academics may seek to know whether discrimination is illegal if based on same-sex attraction itself: they have jurisdiction over interesting questions, and we do not. But the distinction is not decisive. See Christian Legal Soc. Chapter of Univ. of Cal., Hastings Coll. of Law v. Martinez, 561 U.S. 661, 689 (2010) ("Our decisions have declined to distinguish between status and conduct in" the context of sexual orientation.). In any event, the distinction between act and attraction does not

arise in this case because Mr. Zarda's termination was sparked by his avowal of a same-sex relationship.

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

II

The opinion of the Court characterizes its definitional analysis as "the most natural reading of Title VII." Maj. Op. at 21. Not really. "Sex," which is used in series with "race" and "religion," is one of the words least likely to fluctuate in meaning. I do not think I am breaking new ground in saying that the word "sex" as a personal characteristic refers to the male and female of the species. Nor can there be doubt that, when Title VII was drafted in 1964, "sex" drew the distinction between men and women. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." Perrin v. United States, 444 U.S. 37, 42 (1979).

In the opinion of the Court, the word "sex" undergoes modification and expansion. Thus the opinion reasons: "[l]ogically, because sexual orientation is a

function of sex and sex is a protected characteristic under Title VII, it follows that sexual orientation is also protected." Maj. Op. at 22. It is undeniable that sexual orientation is a "function of sex" in the (unhelpful) sense that it cannot be defined or understood without reference to sex. But surely that is because it has to do with sex--as so many things do. *Everything* that cannot be understood without reference to sex does not amount to sex itself as a term in Title VII. So it seems to me that all of these arguments are circular as well as unnecessary.

III

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

that are sweeping and unpredictable: think fitness tests for different characteristics of men and women, not to mention restrooms.

IV

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

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

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

If this case did involve discrimination on the basis of sexual stereotype, it would have been remanded to the District Court on that basis, as was done in Christiansen v. Omnicom Grp., Inc., 852 F.3d 195 (2d Cir. 2017) (per curiam). The reason it could not be remanded on that basis is that the record does not

associate Mr. Zarda with any sexual stereotyping. The case arises from his verbal disclosure of his sexual orientation during his employment as a skydiving instructor, and that is virtually all we know about him. It should not be surprising that a person of any particular sexual orientation would earn a living jumping out of airplanes; but Mr. Zarda cannot fairly be described as evoking somebody's sexual stereotype of homosexual men. So this case does not present the (settled) issue of sexual stereotype, which I think is the very reason we had to go in banc in order to decide this case. As was made clear as recently as March 2017, "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." Id. at 201.