

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

Nos. 17–1618, 17–1623 and 18–107

GERALD LYNN BOSTOCK, PETITIONER
17–1618 *v.*
CLAYTON COUNTY, GEORGIA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE ELEVENTH CIRCUIT

ALTITUDE EXPRESS, INC., ET AL., PETITIONERS
17–1623 *v.*
MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR.,
CO-INDEPENDENT EXECUTORS OF THE ESTATE OF
DONALD ZARDA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,
PETITIONER
18–107 *v.*
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,
ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SIXTH CIRCUIT

[June 15, 2020]

JUSTICE ALITO, with whom JUSTICE THOMAS joins,
dissenting.

There is only one word for what the Court has done today:
legislation. The document that the Court releases is in the
form of a judicial opinion interpreting a statute, but that is
deceptive.

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Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on any of five specified grounds: “race, color, religion, sex, [and] national origin.” 42 U. S. C. §2000e–2(a)(1). Neither “sexual orientation” nor “gender identity” appears on that list. For the past 45 years, bills have been introduced in Congress to add “sexual orientation” to the list,¹ and in recent years, bills have included “gender identity” as well.² But to date, none has passed both Houses.

Last year, the House of Representatives passed a bill that would amend Title VII by defining sex discrimination to include both “sexual orientation” and “gender identity,” H. R. 5, 116th Cong., 1st Sess. (2019), but the bill has stalled in the Senate. An alternative bill, H. R. 5331, 116th Cong., 1st Sess. (2019), would add similar prohibitions but contains provisions to protect religious liberty.³ This bill remains before a House Subcommittee.

Because no such amendment of Title VII has been enacted in accordance with the requirements in the Constitution (passage in both Houses and presentment to the President, Art. I, §7, cl. 2), Title VII’s prohibition of

¹*E.g.*, H. R. 166, 94th Cong., 1st Sess., §6 (1975); H. R. 451, 95th Cong., 1st Sess., §6 (1977); S. 2081, 96th Cong., 1st Sess. (1979); S. 1708, 97th Cong., 1st Sess. (1981); S. 430, 98th Cong., 1st Sess. (1983); S. 1432, 99th Cong., 1st Sess., §5 (1985); S. 464, 100th Cong., 1st Sess., §5 (1987); H. R. 655, 101st Cong., 1st Sess., §2 (1989); S. 574, 102d Cong., 1st Sess., §5 (1991); H. R. 423, 103d Cong., 1st Sess., §2 (1993); S. 932, 104th Cong., 1st Sess. (1995); H. R. 365, 105th Cong., 1st Sess., §2 (1997); H. R. 311, 106th Cong., 1st Sess., §2 (1999); H. R. 217, 107th Cong., 1st Sess., §2 (2001); S. 16, 108th Cong., 1st Sess., §§701–704 (2003); H. R. 288, 109th Cong., 1st Sess., §2 (2005).

²See, *e.g.*, H. R. 2015, 110th Cong., 1st Sess. (2007); H. R. 3017, 111th Cong., 1st Sess. (2009); H. R. 1397, 112th Cong., 1st Sess. (2011); H. R. 1755, 113th Cong., 1st Sess. (2013); H. R. 3185, 114th Cong., 1st Sess., §7 (2015); H. R. 2282, 115th Cong., 1st Sess., §7 (2017); H. R. 5, 116th Cong., 1st Sess. (2019).

³H. R. 5331, 116th Cong., 1st Sess., §§4(b), (c) (2019).

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discrimination because of “sex” still means what it has always meant. But the Court is not deterred by these constitutional niceties. Usurping the constitutional authority of the other branches, the Court has essentially taken H. R. 5’s provision on employment discrimination and issued it under the guise of statutory interpretation.⁴ A more brazen abuse of our authority to interpret statutes is hard to recall.

The Court tries to convince readers that it is merely enforcing the terms of the statute, but that is preposterous. Even as understood today, the concept of discrimination because of “sex” is different from discrimination because of “sexual orientation” or “gender identity.” And in any event, our duty is to interpret statutory terms to “mean what they conveyed to reasonable people *at the time they were written.*” A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 16 (2012) (emphasis added). If every single living American had been surveyed in 1964, it would have been hard to find any who thought that discrimination because of sex meant discrimination because of sexual orientation—not to mention gender identity, a concept that was essentially unknown at the time.

The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late colleague Justice Scalia, but no one should be fooled. The Court’s opinion is like a pirate ship. It sails under a textualist flag, but what it actually represents is a theory of statutory interpretation that Justice Scalia excoriated—the theory that courts should “update” old statutes so that they better reflect the current values of society. See A. Scalia, *A Matter of Interpretation* 22

⁴Section 7(b) of H. R. 5 strikes the term “sex” in 42 U. S. C. §2000e–2 and inserts: “SEX (INCLUDING SEXUAL ORIENTATION AND GENDER IDENTITY).”

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(1997). If the Court finds it appropriate to adopt this theory, it should own up to what it is doing.⁵

Many will applaud today’s decision because they agree on policy grounds with the Court’s updating of Title VII. But the question in these cases is not whether discrimination because of sexual orientation or gender identity *should be* outlawed. The question is *whether Congress did that in 1964*.

It indisputably did not.

I
A

Title VII, as noted, prohibits discrimination “because of . . . sex,” §2000e–2(a)(1), and in 1964, it was as clear as clear could be that this meant discrimination because of the genetic and anatomical characteristics that men and women have at the time of birth. Determined searching has not found a single dictionary from that time that defined “sex” to mean sexual orientation, gender identity, or “transgender status.”⁶ *Ante*, at 2. (Appendix A, *infra*, to

⁵That is what Judge Posner did in the Seventh Circuit case holding that Title VII prohibits discrimination because of sexual orientation. See *Hively v. Ivy Tech Community College of Ind.*, 853 F. 3d 339 (2017) (en banc). Judge Posner agreed with that result but wrote:

“*I would prefer to see us acknowledge openly that today we, who are judges rather than members of Congress, are imposing on a half-century-old statute a meaning of ‘sex discrimination’ that the Congress that enacted it would not have accepted.*” *Id.*, at 357 (concurring opinion) (emphasis added).

⁶The Court does not define what it means by “transgender status,” but the American Psychological Association describes “transgender” as “[a]n umbrella term encompassing those whose gender identities or gender roles differ from those typically associated with the sex they were assigned at birth.” A Glossary: Defining Transgender Terms, 49 *Monitor on Psychology* 32 (Sept. 2018), <https://www.apa.org/monitor/2018/09/ce-corner-glossary>. It defines “gender identity” as “[a]n internal sense of being male, female or something else, which may or may not correspond

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this opinion includes the full definitions of “sex” in the unabridged dictionaries in use in the 1960s.)

In all those dictionaries, the primary definition of “sex” was essentially the same as that in the then-most recent edition of Webster’s New International Dictionary 2296 (def. 1) (2d ed. 1953): “[o]ne of the two divisions of organisms formed on the distinction of male and female.” See also American Heritage Dictionary 1187 (def. 1(a)) (1969) (“The property or quality by which organisms are classified according to their reproductive functions”); Random House Dictionary of the English Language 1307 (def. 1) (1966) (Random House Dictionary) (“the fact or character of being either male or female”); 9 Oxford English Dictionary 577 (def. 1) (1933) (“Either of the two divisions of organic beings distinguished as male and female respectively”).

The Court does not dispute that this is what “sex” means in Title VII, although it coyly suggests that there is at least some support for a different and potentially relevant definition. *Ante*, at 5. (I address alternative definitions below. See Part I–B–3, *infra*.) But the Court declines to stand on that ground and instead “proceed[s] on the assumption that ‘sex’ . . . refer[s] only to biological distinctions between male and female.” *Ante*, at 5.

If that is so, it should be perfectly clear that Title VII does not reach discrimination because of sexual orientation or gender identity. If “sex” in Title VII means biologically male or female, then discrimination because of sex means discrimination because the person in question is biologically male or biologically female, not because that person is sexually attracted to members of the same sex or identifies as a member of a particular gender.

How then does the Court claim to avoid that conclusion?

to an individual’s sex assigned at birth or sex characteristics.” *Ibid*. Under these definitions, there is no apparent difference between discrimination because of transgender status and discrimination because of gender identity.

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The Court tries to cloud the issue by spending many pages discussing matters that are beside the point. The Court observes that a Title VII plaintiff need not show that “sex” was the sole or primary motive for a challenged employment decision or its sole or primary cause; that Title VII is limited to discrimination with respect to a list of specified actions (such as hiring, firing, etc.); and that Title VII protects individual rights, not group rights. See *ante*, at 5–9, 11.

All that is true, but so what? In cases like those before us, a plaintiff must show that sex was a “motivating factor” in the challenged employment action, 42 U. S. C. §2000e–2(m), so the question we must decide comes down to this: if an individual employee or applicant for employment shows that his or her sexual orientation or gender identity was a “motivating factor” in a hiring or discharge decision, for example, is that enough to establish that the employer discriminated “because of . . . sex”? Or, to put the same question in different terms, if an employer takes an employment action solely because of the sexual orientation or gender identity of an employee or applicant, has that employer necessarily discriminated because of biological sex?

The answers to those questions must be no, unless discrimination because of sexual orientation or gender identity inherently constitutes discrimination because of sex. The Court attempts to prove that point, and it argues, not merely that the terms of Title VII *can* be interpreted that way but that they *cannot reasonably be interpreted any other way*. According to the Court, the text is unambiguous. See *ante*, at 24, 27, 30.

The arrogance of this argument is breathtaking. As I will show, there is not a shred of evidence that any Member of Congress interpreted the statutory text that way when Title VII was enacted. See Part III–B, *infra*. But the Court apparently thinks that this was because the Members were not “smart enough to realize” what its language means.

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Hively v. Ivy Tech Community College of Ind., 853 F. 3d 339, 357 (CA7 2017) (Posner, J., concurring). The Court seemingly has the same opinion about our colleagues on the Courts of Appeals, because until 2017, every single Court of Appeals to consider the question interpreted Title VII’s prohibition against sex discrimination to mean discrimination on the basis of biological sex. See Part III–C, *infra*. And for good measure, the Court’s conclusion that Title VII unambiguously reaches discrimination on the basis of sexual orientation and gender identity necessarily means that the EEOC failed to see the obvious for the first 48 years after Title VII became law.⁷ Day in and day out, the Commission enforced Title VII but did not grasp what discrimination “because of . . . sex” unambiguously means. See Part III–C, *infra*.

The Court’s argument is not only arrogant, it is wrong. It fails on its own terms. “Sex,” “sexual orientation,” and “gender identity” are different concepts, as the Court concedes. *Ante*, at 19 (“homosexuality and transgender status are distinct concepts from sex”). And neither “sexual orientation” nor “gender identity” is tied to either of the two biological sexes. See *ante*, at 10 (recognizing that “discrimination on these bases” does not have “some disparate impact on one sex or another”). Both men and women may be attracted to members of the opposite sex, members of the same sex, or members of both sexes.⁸ And individuals who are born with

⁷The EEOC first held that “discrimination against a transgender individual because that person is transgender” violates Title VII in 2012 in *Macy v. Holder*, 2012 WL 1435995, *11 (Apr. 20, 2012), though it earlier advanced that position in an *amicus* brief in Federal District Court in 2011, *ibid.*, n. 16. It did not hold that discrimination on the basis of sexual orientation violated Title VII until 2015. See *Baldwin v. Foxx*, 2015 WL 4397641 (July 15, 2015).

⁸“Sexual orientation refers to a person’s erotic response tendency or sexual attractions, be they directed toward individuals of the same sex (homosexual), the other sex (heterosexual), or both sexes (bisexual).” 1 B.

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the genes and organs of either biological sex may identify with a different gender.⁹

Using slightly different terms, the Court asserts again and again that discrimination because of sexual orientation or gender identity inherently or necessarily entails discrimination because of sex. See *ante*, at 2 (When an employer “fires an individual for being homosexual or transgender,” “[s]ex plays a necessary and undisguisable role in the decision”); *ante*, at 9 (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex”); *ante*, at 11 (“[W]hen an employer discriminates against homosexual or transgender employees, [the] employer . . . inescapably *intends* to rely on sex in its decisionmaking”); *ante*, at 12 (“For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex”); *ante*, at 14 (“When an employer fires an employee for being homosexual or transgender, it necessarily and intentionally discriminates against that individual in part because of sex”); *ante*, at 19 (“[D]iscrimination based on homosexuality or transgender status necessarily entails discrimination based on sex”). But repetition of an assertion does not make it so, and the Court’s repeated assertion is demonstrably untrue.

Contrary to the Court’s contention, discrimination because of sexual orientation or gender identity does not in

Sadock, V. Sadock, & P. Ruiz, *Comprehensive Textbook of Psychiatry* 2061 (9th ed. 2009); see also *American Heritage Dictionary* 1607 (5th ed. 2011) (defining “sexual orientation” as “[t]he direction of a person’s sexual interest, as toward people of the opposite sex, the same sex, or both sexes”); *Webster’s New College Dictionary* 1036 (3d ed. 2008) (defining “sexual orientation” as “[t]he direction of one’s sexual interest toward members of the same, opposite, or both sexes”).

⁹See n. 6, *supra*; see also Sadock, *supra*, at 2063 (“transgender” refers to “any individual who identifies with and adopts the gender role of a member of the other biological sex”).

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and of itself entail discrimination because of sex. We can see this because it is quite possible for an employer to discriminate on those grounds without taking the sex of an individual applicant or employee into account. An employer can have a policy that says: “We do not hire gays, lesbians, or transgender individuals.” And an employer can implement this policy without paying any attention to or even knowing the biological sex of gay, lesbian, and transgender applicants. In fact, at the time of the enactment of Title VII, the United States military had a blanket policy of refusing to enlist gays or lesbians, and under this policy for years thereafter, applicants for enlistment were required to complete a form that asked whether they were “homosexual.” Appendix D, *infra*, at 88, 101.

At oral argument, the attorney representing the employees, a prominent professor of constitutional law, was asked if there would be discrimination because of sex if an employer with a blanket policy against hiring gays, lesbians, and transgender individuals implemented that policy without knowing the biological sex of any job applicants. Her candid answer was that this would “not” be sex discrimination.¹⁰ And she was right.

The attorney’s concession was necessary, but it is fatal to the Court’s interpretation, for if an employer discriminates against individual applicants or employees without even knowing whether they are male or female, it is impossible to argue that the employer intentionally discriminated because of sex. *Contra, ante*, at 19. An employer cannot intentionally discriminate on the basis of a characteristic of which the employer has no knowledge. And if an employer does not violate Title VII by discriminating on the basis of

¹⁰See Tr. of Oral Arg. in Nos. 17–1618, 17–1623, pp. 69–70 (“If there was that case, it might be the rare case in which sexual orientation discrimination is not a subset of sex”); see also *id.*, at 69 (“Somebody who comes in and says I’m not going to tell you what my sex is, but, believe me, I was fired for my sexual orientation, that person will lose”).

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sexual orientation or gender identity without knowing the sex of the affected individuals, there is no reason why the same employer could not lawfully implement the same policy even if it knows the sex of these individuals. If an employer takes an adverse employment action for a perfectly legitimate reason—for example, because an employee stole company property—that action is not converted into sex discrimination simply because the employer knows the employee’s sex. As explained, a disparate treatment case requires proof of intent—*i.e.*, that the employee’s sex motivated the firing. In short, what this example shows is that discrimination because of sexual orientation or gender identity does not inherently or necessarily entail discrimination because of sex, and for that reason, the Court’s chief argument collapses.

Trying to escape the consequences of the attorney’s concession, the Court offers its own hypothetical:

“Suppose an employer’s application form offered a single box to check if the applicant is either black or Catholic. If the employer refuses to hire anyone who checks that box, would we conclude the employer has complied with Title VII, so long as it studiously avoids learning any particular applicant’s race or religion? Of course not.” *Ante*, at 18.

How this hypothetical proves the Court’s point is a mystery. A person who checked that box would presumably be black, Catholic, or both, and refusing to hire an applicant because of race or religion is prohibited by Title VII. Rejecting applicants who checked a box indicating that they are homosexual is entirely different because it is impossible to tell from that answer whether an applicant is male or female.

The Court follows this strange hypothetical with an even stranger argument. The Court argues that an applicant

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could not answer the question whether he or she is homosexual without knowing something about sex. If the applicant was unfamiliar with the term “homosexual,” the applicant would have to look it up or ask what the term means. And because this applicant would have to take into account his or her sex and that of the persons to whom he or she is sexually attracted to answer the question, it follows, the Court reasons, that an employer could not reject this applicant without taking the applicant’s sex into account. See *ante*, at 18–19.

This is illogical. Just because an applicant cannot say whether he or she is homosexual without knowing his or her own sex and that of the persons to whom the applicant is attracted, it does not follow that an employer cannot reject an applicant based on homosexuality without knowing the applicant’s sex.

While the Court’s imagined application form proves nothing, another hypothetical case offered by the Court is telling. But what it proves is not what the Court thinks. The Court posits:

“Imagine an employer who has a policy of firing any employee known to be homosexual. The employer hosts an office holiday party and invites employees to bring their spouses. A model employee arrives and introduces a manager to Susan, the employee’s wife. Will that employee be fired? If the policy works as the employer intends, the answer depends entirely on whether the model employee is a man or a woman.”
Ante, at 11.

This example disproves the Court’s argument because it is perfectly clear that the employer’s motivation in firing the female employee had nothing to do with that employee’s sex. The employer presumably knew that this employee was a woman before she was invited to the fateful party. Yet the employer, far from holding her biological sex

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against her, rated her a “model employee.” At the party, the employer learned something new, her sexual orientation, and it was this new information that motivated her discharge. So this is another example showing that discrimination because of sexual orientation does not inherently involve discrimination because of sex.

In addition to the failed argument just discussed, the Court makes two other arguments, more or less in passing. The first of these is essentially that sexual orientation and gender identity are closely related to sex. The Court argues that sexual orientation and gender identity are “inextricably bound up with sex,” *ante*, at 10, and that discrimination on the basis of sexual orientation or gender identity involves the application of “sex-based rules,” *ante*, at 17. This is a variant of an argument found in many of the briefs filed in support of the employees and in the lower court decisions that agreed with the Court’s interpretation. All these variants stress that sex, sexual orientation, and gender identity are related concepts. The Seventh Circuit observed that “[i]t would require considerable calisthenics to remove ‘sex’ from ‘sexual orientation.’” *Hively*, 853 F. 3d, at 350.¹¹ The Second Circuit wrote that sex is necessarily “a factor in sexual orientation” and further concluded that “sexual orientation is a function of sex.” 883 F. 3d 100, 112–113 (CA2 2018) (en banc). Bostock’s brief and those of *amici* supporting his position contend that sexual orientation is “a sex-based consideration.”¹² Other briefs state that sexual orientation is “a function of sex”¹³ or is “intrinsically related to

¹¹ See also Brief for William N. Eskridge Jr. et al. as *Amici Curiae* 2 (“[T]here is no reasonable way to disentangle sex from same-sex attraction or transgender status”).

¹² Brief for Petitioner in No. 17–1618, at 14; see also Brief for Southern Poverty Law Center et al. as *Amici Curiae* 7–8.

¹³ Brief for Scholars Who Study the LGB Population as *Amici Curiae* in Nos. 17–1618, 17–1623, p. 10.

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sex.”¹⁴ Similarly, Stephens argues that sex and gender identity are necessarily intertwined: “By definition, a transgender person is someone who lives and identifies with a sex different than the sex assigned to the person at birth.”¹⁵

It is curious to see this argument in an opinion that purports to apply the purest and highest form of textualism because the argument effectively amends the statutory text. Title VII prohibits discrimination because of *sex itself*, not everything that is related to, based on, or defined with reference to, “sex.” Many things are related to sex. Think of all the nouns other than “orientation” that are commonly modified by the adjective “sexual.” Some examples yielded by a quick computer search are “sexual harassment,” “sexual assault,” “sexual violence,” “sexual intercourse,” and “sexual content.”

Does the Court really think that Title VII prohibits discrimination on all these grounds? Is it unlawful for an employer to refuse to hire an employee with a record of sexual harassment in prior jobs? Or a record of sexual assault or violence?

To be fair, the Court does not claim that Title VII prohibits discrimination because of *everything* that is related to sex. The Court draws a distinction between things that are “inextricably” related and those that are related in “some vague sense.” *Ante*, at 10. Apparently the Court would graft onto Title VII some arbitrary line separating the things that are related closely enough and those that are not.¹⁶ And it would do this in the name of high textualism.

¹⁴Brief for American Psychological Association et al. as *Amici Curiae* 11.

¹⁵Reply Brief for Respondent Aimee Stephens in No. 18–107, p. 5.

¹⁶Notably, Title VII itself already suggests a line, which the Court ignores. The statute specifies that the terms “because of sex” and “on the basis of sex” cover certain conditions that are biologically tied to sex,

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An additional argument made in passing also fights the text of Title VII and the policy it reflects. The Court proclaims that “[a]n individual’s homosexuality or transgender status is not relevant to employment decisions.” *Ante*, at 9. That is the policy view of many people in 2020, and perhaps Congress would have amended Title VII to implement it if this Court had not intervened. But that is not the policy embodied in Title VII in its current form. Title VII prohibits discrimination based on five specified grounds, and neither sexual orientation nor gender identity is on the list. As long as an employer does not discriminate based on one of the listed grounds, the employer is free to decide for itself which characteristics are “relevant to [its] employment decisions.” *Ibid.* By proclaiming that sexual orientation and gender identity are “not relevant to employment decisions,” the Court updates Title VII to reflect what it regards as 2020 values.

The Court’s remaining argument is based on a hypothetical that the Court finds instructive. In this hypothetical, an employer has two employees who are “attracted to men,” and “*to the employer’s mind*” the two employees are “materially identical” except that one is a man and the other is a woman. *Ante*, at 9 (emphasis added). The Court reasons that if the employer fires the man but not the woman, the employer is necessarily motivated by the man’s biological sex. *Ante*, at 9–10. After all, if two employees are identical in every respect but sex, and the employer fires only one, what other reason could there be?

The problem with this argument is that the Court loads the dice. That is so because in the mind of an employer who does not want to employ individuals who are attracted to

namely, “pregnancy, childbirth, [and] related medical conditions.” 42 U. S. C. §2000e(k). This definition should inform the meaning of “because of sex” in Title VII more generally. Unlike pregnancy, neither sexual orientation nor gender identity is biologically linked to women or men.

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members of the same sex, these two employees are not materially identical in every respect but sex. On the contrary, they differ in another way that the employer thinks is quite material. And until Title VII is amended to add sexual orientation as a prohibited ground, this is a view that an employer is permitted to implement. As noted, other than prohibiting discrimination on any of five specified grounds, “race, color, religion, sex, [and] national origin.” 42 U. S. C. §2000e–2(a)(1), Title VII allows employers to decide whether two employees are “materially identical.” Even idiosyncratic criteria are permitted; if an employer thinks that Scorpios make bad employees, the employer can refuse to hire Scorpios. Such a policy would be unfair and foolish, but under Title VII, it is permitted. And until Title VII is amended, so is a policy against employing gays, lesbians, or transgender individuals.

Once this is recognized, what we have in the Court’s hypothetical case are two employees who differ in *two* ways—sex and sexual orientation—and if the employer fires one and keeps the other, all that can be inferred is that the employer was motivated either entirely by sexual orientation, entirely by sex, or in part by both. We cannot infer with any certainty, as the hypothetical is apparently meant to suggest, that the employer was motivated even in part by sex. The Court harps on the fact that under Title VII a prohibited ground need not be the sole motivation for an adverse employment action, see *ante*, at 10–11, 14–15, 21, but its example does not show that sex necessarily played *any* part in the employer’s thinking.

The Court tries to avoid this inescapable conclusion by arguing that sex is really the only difference between the two employees. This is so, the Court maintains, because both employees “are attracted to men.” *Ante*, at 9–10. Of course, the employer would couch its objection to the man differently. It would say that its objection was his sexual orientation. So this may appear to leave us with a battle of

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labels. If the employer’s objection to the male employee is characterized as attraction to men, it seems that he is just like the woman in all respects except sex and that the employer’s disparate treatment must be based on that one difference. On the other hand, if the employer’s objection is sexual orientation or homosexuality, the two employees differ in two respects, and it cannot be inferred that the disparate treatment was due even in part to sex.

The Court insists that its label is the right one, and that presumably is why it makes such a point of arguing that an employer cannot escape liability under Title VII by giving sex discrimination some other name. See *ante*, at 14, 17. That is certainly true, but so is the opposite. Something that is *not* sex discrimination cannot be converted into sex discrimination by slapping on that label. So the Court cannot prove its point simply by labeling the employer’s objection as “attract[ion] to men.” *Ante*, at 9–10. Rather, the Court needs to show that its label is the correct one.

And a labeling standoff would not help the Court because that would mean that the bare text of Title VII does not unambiguously show that its interpretation is right. The Court would have no justification for its stubborn refusal to look any further.

As it turns out, however, there is no standoff. It can easily be shown that the employer’s real objection is not “attract[ion] to men” but homosexual orientation.

In an effort to prove its point, the Court carefully includes in its example just two employees, a homosexual man and a heterosexual woman, but suppose we add two more individuals, a woman who is attracted to women and a man who is attracted to women. (A large employer will likely have applicants and employees who fall into all four categories, and a small employer can potentially have all four as well.) We now have the four exemplars listed below, with the discharged employees crossed out:

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~~Man attracted to men~~
Woman attracted to men
~~Woman attracted to women~~
Man attracted to women

The discharged employees have one thing in common. It is not biological sex, attraction to men, or attraction to women. It is attraction to members of their own sex—in a word, sexual orientation. And that, we can infer, is the employer’s real motive.

In sum, the Court’s textual arguments fail on their own terms. The Court tries to prove that “it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex,” *ante*, at 9, but as has been shown, it is entirely possible for an employer to do just that. “[H]omosexuality and transgender status are distinct concepts from sex,” *ante*, at 19, and discrimination because of sexual orientation or transgender status does not inherently or necessarily constitute discrimination because of sex. The Court’s arguments are squarely contrary to the statutory text.

But even if the words of Title VII did not definitively refute the Court’s interpretation, that would not justify the Court’s refusal to consider alternative interpretations. The Court’s excuse for ignoring everything other than the bare statutory text is that the text is unambiguous and therefore no one can reasonably interpret the text in any way other than the Court does. Unless the Court has met that high standard, it has no justification for its blinkered approach. And to say that the Court’s interpretation is the only possible reading is indefensible.

B

Although the Court relies solely on the arguments discussed above, several other arguments figure prominently in the decisions of the lower courts and in briefs submitted

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by or in support of the employees. The Court apparently finds these arguments unpersuasive, and so do I, but for the sake of completeness, I will address them briefly.

1

One argument, which relies on our decision in *Price Waterhouse v. Hopkins*, 490 U. S. 228 (1989) (plurality opinion), is that discrimination because of sexual orientation or gender identity violates Title VII because it constitutes prohibited discrimination on the basis of sex stereotypes. See 883 F. 3d, at 119–123; *Hively*, 853 F. 3d, at 346; 884 F. 3d 560, 576–577 (CA6 2018). The argument goes like this. Title VII prohibits discrimination based on stereotypes about the way men and women should behave; the belief that a person should be attracted only to persons of the opposite sex and the belief that a person should identify with his or her biological sex are examples of such stereotypes; therefore, discrimination on either of these grounds is unlawful.

This argument fails because it is based on a faulty premise, namely, that Title VII forbids discrimination based on sex stereotypes. It does not. It prohibits discrimination because of “sex,” and the two concepts are not the same. See *Price Waterhouse*, 490 U. S., at 251. That does not mean, however, that an employee or applicant for employment cannot prevail by showing that a challenged decision was based on a sex stereotype. Such evidence is relevant to prove discrimination because of sex, and it may be convincing where the trait that is inconsistent with the stereotype is one that would be tolerated and perhaps even valued in a person of the opposite sex. See *ibid.*

Much of the plaintiff’s evidence in *Price Waterhouse* was of this nature. The plaintiff was a woman who was passed over for partnership at an accounting firm, and some of the adverse comments about her work appeared to criticize her for being forceful and insufficiently “feminin[e].” *Id.*, at 235–236.

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The main issue in *Price Waterhouse*—the proper allocation of the burdens of proof in a so-called mixed motives Title VII case—is not relevant here, but the plurality opinion, endorsed by four Justices, commented on the issue of sex stereotypes. The plurality observed that “sex stereotypes do not inevitably prove that gender played a part in a particular employment decision” but “can certainly be *evidence* that gender played a part.” *Id.*, at 251.¹⁷ And the plurality made it clear that “[t]he plaintiff must show that the employer actually relied on her gender in making its decision.” *Ibid.*

Plaintiffs who allege that they were treated unfavorably because of their sexual orientation or gender identity are not in the same position as the plaintiff in *Price Waterhouse*. In cases involving discrimination based on sexual orientation or gender identity, the grounds for the employer’s decision—that individuals should be sexually attracted only to persons of the opposite biological sex or should identify with their biological sex—apply equally to men and women. “[H]eterosexuality is not a *female* stereotype; it not a *male* stereotype; it is not a *sex-specific* stereotype at all.” *Hively*, 853 F. 3d, at 370 (Sykes, J., dissenting).

To be sure, there may be cases in which a gay, lesbian, or transgender individual can make a claim like the one in *Price Waterhouse*. That is, there may be cases where traits or behaviors that some people associate with gays, lesbians, or transgender individuals are tolerated or valued in persons of one biological sex but not the other. But that is a

¹⁷Two other Justices concurred in the judgment but did not comment on the issue of stereotypes. See *id.*, at 258–261 (opinion of White, J.); *id.*, at 261–279 (opinion of O’Connor, J.). And Justice Kennedy reiterated on behalf of the three Justices in dissent that “Title VII creates no independent cause of action for sex stereotyping,” but he added that “[e]vidence of use by decisionmakers of sex stereotypes is, of course, quite relevant to the question of discriminatory intent.” *Id.*, at 294.

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different matter.

2

A second prominent argument made in support of the result that the Court now reaches analogizes discrimination against gays and lesbians to discrimination against a person who is married to or has an intimate relationship with a person of a different race. Several lower court cases have held that discrimination on this ground violates Title VII. See, e.g., *Holcomb v. Iona College*, 521 F. 3d 130 (CA2 2008); *Parr v. Woodmen of World Life Ins. Co.*, 791 F. 2d 888 (CA11 1986). And the logic of these decisions, it is argued, applies equally where an employee or applicant is treated unfavorably because he or she is married to, or has an intimate relationship with, a person of the same sex.

This argument totally ignores the historically rooted reason why discrimination on the basis of an interracial relationship constitutes race discrimination. And without taking history into account, it is not easy to see how the decisions in question fit the terms of Title VII.

Recall that Title VII makes it unlawful for an employer to discriminate against an individual “because of *such individual’s race*.” 42 U. S. C. §2000e–2(a) (emphasis added). So if an employer is happy to employ whites and blacks but will not employ any employee in an interracial relationship, how can it be said that the employer is discriminating against either whites or blacks “because of such individual’s race”? This employer would be applying the same rule to all its employees regardless of their race.

The answer is that this employer is discriminating on a ground that history tells us is a core form of race discrimination.¹⁸ “It would require absolute blindness to the history

¹⁸Notably, Title VII recognizes that in light of history distinctions on the basis of race are always disadvantageous, but it permits certain dis-

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of racial discrimination in this country not to understand what is at stake in such cases A prohibition on ‘race-mixing’ was . . . grounded in bigotry against a particular race and was an integral part of preserving the rigid hierarchical distinction that denominated members of the black race as inferior to whites.” 883 F. 3d, at 158–159 (Lynch, J., dissenting).

Discrimination because of sexual orientation is different. It cannot be regarded as a form of sex discrimination on the ground that applies in race cases since discrimination because of sexual orientation is not historically tied to a project that aims to subjugate either men or women. An employer who discriminates on this ground might be called “homophobic” or “transphobic,” but not sexist. See *Wittmer v. Phillips 66 Co.*, 915 F. 3d 328, 338 (CA5 2019) (Ho, J., concurring).

3

The opinion of the Court intimates that the term “sex” was not universally understood in 1964 to refer just to the categories of male and female, see *ante*, at 5, and while the Court does not take up any alternative definition as a ground for its decision, I will say a word on this subject.

As previously noted, the definitions of “sex” in the unbridged dictionaries in use in the 1960s are reproduced in Appendix A, *infra*. Anyone who examines those definitions can see that the primary definition in every one of them refers to the division of living things into two groups, male and female, based on biology, and most of the definitions further down the list are the same or very similar. In addition, some definitions refer to heterosexual sex acts. See

tinctions based on sex. Title 42 U. S. C. §2000e–2(e)(1) allows for “instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise.” Race is wholly absent from this list.

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Random House Dictionary 1307 (“coitus,” “sexual intercourse” (defs. 5–6)); American Heritage Dictionary, at 1187 (“sexual intercourse” (def. 5)).¹⁹

Aside from these, what is there? One definition, “to neck passionately,” Random House Dictionary 1307 (def. 8), refers to sexual conduct that is not necessarily heterosexual. But can it be seriously argued that one of the aims of Title VII is to outlaw employment discrimination against employees, whether heterosexual or homosexual, who engage in necking? And even if Title VII had that effect, that is not what is at issue in cases like those before us.

That brings us to the two remaining subsidiary definitions, both of which refer to sexual urges or instincts and their manifestations. See the fourth definition in the American Heritage Dictionary, at 1187 (“the sexual urge or instinct as it manifests itself in behavior”), and the fourth definition in both Webster’s Second and Third (“[p]henomena of sexual instincts and their manifestations,” Webster’s New International Dictionary, at 2296 (2d ed.); Webster’s Third New International Dictionary 2081 (1966)). Since both of these come after three prior definitions that refer to men and women, they are most naturally read to have the same association, and in any event, is it plausible that Title VII prohibits discrimination based on *any* sexual urge or instinct and its manifestations? The urge to rape?

Viewing all these definitions, the overwhelming impact is that discrimination because of “sex” was understood during the era when Title VII was enacted to refer to men and women. (The same is true of current definitions, which are reproduced in Appendix B, *infra*.) This no doubt explains why neither this Court nor any of the lower courts have tried to make much of the dictionary definitions of sex just

¹⁹See American Heritage Dictionary 1188 (1969) (defining “sexual intercourse”); Webster’s Third New International Dictionary 2082 (1966) (same); Random House Dictionary of the English Language 1308 (1966) (same).

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discussed.

II

A

So far, I have not looked beyond dictionary definitions of “sex,” but textualists like Justice Scalia do not confine their inquiry to the scrutiny of dictionaries. See Manning, *Textualism and the Equity of the Statute*, 101 *Colum. L. Rev.* 1, 109 (2001). Dictionary definitions are valuable because they are evidence of what people at the time of a statute’s enactment would have understood its words to mean. *Ibid.* But they are not the only source of relevant evidence, and what matters in the end is the answer to the question that the evidence is gathered to resolve: How would the terms of a statute have been understood by ordinary people at the time of enactment?

Justice Scalia was perfectly clear on this point. The words of a law, he insisted, “mean *what they conveyed to reasonable people at the time.*” *Reading Law*, at 16 (emphasis added).²⁰

Leading proponents of Justice Scalia’s school of textualism have expounded on this principle and explained that it is grounded on an understanding of the way language works. As Dean John F. Manning explains, “the meaning of language depends on the way a linguistic community uses words and phrases in context.” *What Divides Textualists From Purposivists?* 106 *Colum. L. Rev.* 70, 78 (2006). “[O]ne can make sense of others’ communications only by placing them in their appropriate social and linguistic context,” *id.*, at 79–80, and this is no less true of statutes than any other verbal communications. “[S]tatutes convey meaning only because members of a relevant linguistic

²⁰See also *Chisom v. Roemer*, 501 U. S. 380, 405 (1991) (Scalia, J., dissenting) (“We are to read the words of [a statutory] text as any ordinary Member of Congress would have read them . . . and apply the meaning so determined”).

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community apply shared background conventions for understanding how particular words are used in particular contexts.” Manning, *The Absurdity Doctrine*, 116 Harv. L. Rev. 2387, 2457 (2003). Therefore, judges should ascribe to the words of a statute “what a reasonable person conversant with applicable social conventions would have understood them to be adopting.” Manning, 106 Colum. L. Rev., at 77. Or, to put the point in slightly different terms, a judge interpreting a statute should ask “what one would ordinarily be understood as saying, given the circumstances in which one said it.” Manning, 116 Harv. L. Rev., at 2397–2398.

Judge Frank Easterbrook has made the same points:

“Words are arbitrary signs, having meaning only to the extent writers and readers share an understanding. . . . Language in general, and legislation in particular, is a social enterprise to which both speakers and listeners contribute, drawing on background understandings and the structure and circumstances of the utterance.” *Herrmann v. Cencom Cable Assocs., Inc.*, 978 F. 2d 978, 982 (CA7 1992).

Consequently, “[s]licing a statute into phrases while ignoring . . . the setting of the enactment . . . is a formula for disaster.” *Ibid.*; see also *Continental Can Co. v. Chicago Truck Drivers, Helpers and Warehouse Workers Union (Independent) Pension Fund*, 916 F. 2d 1154, 1157 (CA7 1990) (“You don’t have to be Ludwig Wittgenstein or Hans-Georg Gadamer to know that successful communication depends on meanings shared by interpretive communities”).

Thus, when textualism is properly understood, it calls for an examination of the social context in which a statute was enacted because this may have an important bearing on what its words were understood to mean at the time of enactment. Textualists do not read statutes as if they were messages picked up by a powerful radio telescope from a

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distant and utterly unknown civilization. Statutes consist of communications between members of a particular linguistic community, one that existed in a particular place and at a particular time, and these communications must therefore be interpreted as they were understood by that community at that time.

For this reason, it is imperative to consider how Americans in 1964 would have understood Title VII's prohibition of discrimination because of sex. To get a picture of this, we may imagine this scene. Suppose that, while Title VII was under consideration in Congress, a group of average Americans decided to read the text of the bill with the aim of writing or calling their representatives in Congress and conveying their approval or disapproval. What would these ordinary citizens have taken "discrimination because of sex" to mean? Would they have thought that this language prohibited discrimination because of sexual orientation or gender identity?

B

The answer could not be clearer. In 1964, ordinary Americans reading the text of Title VII would not have dreamed that discrimination because of sex meant discrimination because of sexual orientation, much less gender identity. The *ordinary meaning* of discrimination because of "sex" was discrimination because of a person's biological sex, not sexual orientation or gender identity. The possibility that discrimination on either of these grounds might fit within some exotic understanding of sex discrimination would not have crossed their minds.

1

In 1964, the concept of prohibiting discrimination "because of sex" was no novelty. It was a familiar and well-understood concept, and what it meant was equal treatment for men and women.

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Long before Title VII was adopted, many pioneering state and federal laws had used language substantively indistinguishable from Title VII's critical phrase, "discrimination because of sex." For example, the California Constitution of 1879 stipulated that no one, "*on account of sex*, [could] be disqualified from entering upon or pursuing any lawful business, vocation, or profession." Art. XX, §18 (emphasis added). It also prohibited a student's exclusion from any state university department "on account of sex." Art. IX, §9; accord, Mont. Const., Art. XI, §9 (1889).

Wyoming's first Constitution proclaimed broadly that "[b]oth male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges," Art. VI, §1 (1890), and then provided specifically that "[i]n none of the public schools . . . shall distinction or discrimination be made *on account of sex*," Art. VII, §10 (emphasis added); see also §16 (the "university shall be equally open to students of both sexes"). Washington's Constitution likewise required "ample provision for the education of all children . . . without distinction or preference *on account of . . . sex*." Art. IX, §1 (1889) (emphasis added).

The Constitution of Utah, adopted in 1895, provided that the right to vote and hold public office "shall not be denied or abridged *on account of sex*." Art. IV, §1 (emphasis added). And in the next sentence it made clear what "on account of sex" meant, stating that "[b]oth male and female citizens . . . shall enjoy equally all civil, political and religious rights and privileges." *Ibid.*

The most prominent example of a provision using this language was the Nineteenth Amendment, ratified in 1920, which bans the denial or abridgment of the right to vote "on account of sex." U. S. Const., Amdt. 19. Similar language appeared in the proposal of the National Woman's Party for an Equal Rights Amendment. As framed in 1921, this proposal forbade all "political, civil or legal disabilities or inequalities *on account of sex*, [o]r on account of marriage."

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Women Lawyers Meet: Representatives of 20 States Endorse Proposed Equal Rights Amendment, N. Y. Times, Sept. 16, 1921, p. 10.

Similar terms were used in the precursor to the Equal Pay Act. Introduced in 1944 by Congresswoman Winifred C. Stanley, it proclaimed that “[d]iscrimination against employees, in rates of compensation paid, *on account of sex*” was “contrary to the public interest.” H. R. 5056, 78th Cong., 2d Sess.

In 1952, the new Constitution for Puerto Rico, which was approved by Congress, 66 Stat. 327, prohibited all “discrimination . . . *on account of . . . sex*,” Art. II, Bill of Rights §1 (emphasis added), and in the landmark Immigration and Nationality Act of 1952, Congress outlawed discrimination in naturalization “*because of . . . sex*.” 8 U. S. C. §1422 (emphasis added).

In 1958, the International Labour Organisation, a United Nations agency of which the United States is a member, recommended that nations bar employment discrimination “made *on the basis of . . . sex*.” Convention (No. 111) Concerning Discrimination in Respect of Employment and Occupation, Art. 1(a), June 25, 1958, 362 U. N. T. S. 32 (emphasis added).

In 1961, President Kennedy ordered the Civil Service Commission to review and modify personnel policies “to assure that selection for any career position is hereinafter made solely on the basis of individual merit and fitness, *without regard to sex*.”²¹ He concurrently established a “Commission on the Status of Women” and directed it to recommend policies “for overcoming discriminations in government and private employment *on the basis of sex*.” Exec. Order No. 10980, 3 CFR 138 (1961 Supp.) (emphasis

²¹J. Kennedy, Statement by the President on the Establishment of the President’s Commission on the Status of Women 3 (Dec. 14, 1961) (emphasis added), <https://www.jfklibrary.org/asset-viewer/archives/JFKPOF/093/JFKPOF-093-004>.

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added).

In short, the concept of discrimination “because of,” “on account of,” or “on the basis of” sex was well understood. It was part of the campaign for equality that had been waged by women’s rights advocates for more than a century, and what it meant was equal treatment for men and women.²²

2

Discrimination “because of sex” was not understood as having anything to do with discrimination because of sexual orientation or transgender status. Any such notion would have clashed in spectacular fashion with the societal norms of the day.

For most 21st-century Americans, it is painful to be reminded of the way our society once treated gays and lesbians, but any honest effort to understand what the terms of Title VII were understood to mean when enacted must take into account the societal norms of that time. And the plain truth is that in 1964 homosexuality was thought to be a mental disorder, and homosexual conduct was regarded as morally culpable and worthy of punishment.

²²Analysis of the way Title VII’s key language was used in books and articles during the relevant time period supports this conclusion. A study searched a vast database of documents from that time to determine how the phrase “discriminate against . . . because of [some trait]” was used. Phillips, *The Overlooked Evidence in the Title VII Cases: The Linguistic (and Therefore Textualist) Principle of Compositionality* (manuscript, at 3) (May 11, 2020) (brackets in original), <https://ssrn.com/abstract=3585940>. The study found that the phrase was used to denote discrimination against “someone . . . motivated by prejudice, or biased ideas or attitudes . . . directed at people with that trait in particular.” *Id.*, at 7 (emphasis deleted). In other words, “*discriminate against*” was “associated with negative treatment directed at members of a discrete group.” *Id.*, at 5. Thus, as used in 1964, “discrimination because of sex” would have been understood to mean discrimination against a woman or a man based on “unfair beliefs or attitudes” about members of that particular sex. *Id.*, at 7.

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In its then-most recent Diagnostic and Statistical Manual of Mental Disorders (1952) (DSM–I), the American Psychiatric Association (APA) classified same-sex attraction as a “sexual deviation,” a particular type of “sociopathic personality disturbance,” *id.*, at 38–39, and the next edition, issued in 1968, similarly classified homosexuality as a “sexual deviatio[n],” Diagnostic and Statistical Manual of Mental Disorders 44 (2d ed.) (DSM–II). It was not until the sixth printing of the DSM–II in 1973 that this was changed.²³

Society’s treatment of homosexuality and homosexual conduct was consistent with this understanding. Sodomy was a crime in every State but Illinois, see W. Eskridge, *Dishonorable Passions* 387–407 (2008), and in the District of Columbia, a law enacted by Congress made sodomy a felony punishable by imprisonment for up to 10 years and permitted the indefinite civil commitment of “sexual psychopath[s],” Act of June 9, 1948, §§104, 201–207, 62 Stat. 347–349.²⁴

²³APA, *Homosexuality and Sexual Orientation Disturbance: Proposed Change in DSM–II, 6th Printing*, p. 44 (APA Doc. Ref. No. 730008, 1973) (reclassifying “homosexuality” as a “[s]exual orientation disturbance,” a category “for individuals whose sexual interests are directed primarily toward people of the same sex and who are either disturbed by . . . or wish to change their sexual orientation,” and explaining that “homosexuality . . . by itself does not constitute a psychiatric disorder”); see also APA, *Diagnostic and Statistical Manual of Mental Disorders* 281–282 (3d ed. 1980) (DSM–III) (similarly creating category of “Ego-dystonic Homosexuality” for “homosexuals for whom changing sexual orientation is a persistent concern,” while observing that “homosexuality itself is not considered a mental disorder”); *Obergefell v. Hodges*, 576 U. S. 644, 661 (2015).

²⁴In 1981, after achieving home rule, the District attempted to decriminalize sodomy, see D. C. Act No. 4–69, but the House of Representatives vetoed the bill, H. Res. 208, 97th Cong., 1st Sess. (1981); 127 Cong. Rec. 22764–22779 (1981). Sodomy was not decriminalized in the District until 1995. See Anti-Sexual Abuse Act of 1994, §501(b), 41 D. C. Reg. 53 (1995), enacted as D. C. Law 10–257.

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This view of homosexuality was reflected in the rules governing the federal work force. In 1964, federal “[a]gencies could deny homosexual men and women employment because of their sexual orientation,” and this practice continued until 1975. GAO, D. Heivilin, *Security Clearances: Consideration of Sexual Orientation in the Clearance Process 2* (GAO/NSIAD–95–21, 1995). See, e.g., *Anonymous v. Macy*, 398 F. 2d 317, 318 (CA5 1968) (affirming dismissal of postal employee for homosexual acts).

In 1964, individuals who were known to be homosexual could not obtain security clearances, and any who possessed clearances were likely to lose them if their orientation was discovered. A 1953 Executive Order provided that background investigations should look for evidence of “sexual perversion,” as well as “[a]ny criminal, infamous, dishonest, immoral, or notoriously disgraceful conduct.” Exec. Order No. 10450, §8(a)(1)(iii), 3 CFR 938 (1949–1953 Comp.). “Until about 1991, when agencies began to change their security policies and practices regarding sexual orientation, there were a number of documented cases where defense civilian or contractor employees’ security clearances were denied or revoked because of their sexual orientation.” GAO, *Security Clearances*, at 2. See, e.g., *Adams v. Laird*, 420 F. 2d 230, 240 (CADDC 1969) (upholding denial of security clearance to defense contractor employee because he had “engaged in repeated homosexual acts”); see also *Webster v. Doe*, 486 U. S. 592, 595, 601 (1988) (concluding that decision to fire a particular individual because he was homosexual fell within the “discretion” of the Director of Central Intelligence under the National Security Act of 1947 and thus was unreviewable under the APA).

The picture in state employment was similar. In 1964, it was common for States to bar homosexuals from serving as teachers. An article summarizing the situation *15 years after Title VII became law* reported that “[a]ll states have statutes that permit the revocation of teaching certificates

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(or credentials) for immorality, moral turpitude, or unprofessionalism,” and, the survey added, “[h]omosexuality is considered to fall within all three categories.”²⁵

The situation in California is illustrative. California laws prohibited individuals who engaged in “immoral conduct” (which was construed to include homosexual behavior), as well as those convicted of “sex offenses” (like sodomy), from employment as teachers. Cal. Educ. Code Ann. §§13202, 13207, 13209, 13218, 13255 (West 1960). The teaching certificates of individuals convicted of engaging in homosexual acts were revoked. See, e.g., *Sarac v. State Bd. of Ed.*, 249 Cal. App. 2d 58, 62–64, 57 Cal. Rptr. 69, 72–73 (1967) (upholding revocation of secondary teaching credential from teacher who was convicted of engaging in homosexual conduct on public beach), overruled in part, *Morrison v. State Bd. of Ed.*, 1 Cal. 3d 214, 461 P. 2d 375 (1969).

In Florida, the legislature enacted laws authorizing the revocation of teaching certificates for “misconduct involving moral turpitude,” Fla. Stat. Ann. §229.08(16) (1961), and this law was used to target homosexual conduct. In 1964, a legislative committee was wrapping up a 6-year campaign to remove homosexual teachers from public schools and state universities. As a result of these efforts, the state board of education apparently revoked at least 71 teachers’ certificates and removed at least 14 university professors. Eskridge, *Dishonorable Passions*, at 103.

Individuals who engaged in homosexual acts also faced the loss of other occupational licenses, such as those needed to work as a “lawyer, doctor, mortician, [or] beautician.”²⁶ See, e.g., *Florida Bar v. Kay*, 232 So. 2d 378 (Fla. 1970) (attorney disbarred after conviction for homosexual conduct in

²⁵ Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *Hastings L. J.* 799, 861 (1979).

²⁶ Eskridge, *Challenging the Apartheid of the Closet: Establishing Conditions for Lesbian and Gay Intimacy, Nomos, and Citizenship, 1961–1981*, 25 *Hofstra L. Rev.* 817, 819 (1997).

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public bathroom).

In 1964 and for many years thereafter, homosexuals were barred from the military. See, *e.g.*, Army Reg. 635–89, §I(2) (a) (July 15, 1966) (“Personnel who voluntarily engage in homosexual acts, irrespective of sex, will not be permitted to serve in the Army in any capacity, and their prompt separation is mandatory”); Army Reg. 600–443, §I(2) (April 10, 1953) (similar). Prohibitions against homosexual conduct by members of the military were not eliminated until 2010. See Don’t Ask, Don’t Tell Repeal Act of 2010, 124 Stat. 3515 (repealing 10 U. S. C. §654, which required members of the Armed Forces to be separated for engaging in homosexual conduct).

Homosexuals were also excluded from entry into the United States. The Immigration and Nationality Act of 1952 (INA) excluded aliens “afflicted with psychopathic personality.” 8 U. S. C. §1182(a)(4) (1964 ed.). In *Boutilier v. INS*, 387 U. S. 118, 120–123 (1967), this Court, relying on the INA’s legislative history, interpreted that term to encompass homosexuals and upheld an alien’s deportation on that ground. Three Justices disagreed with the majority’s interpretation of the phrase “psychopathic personality.”²⁷ But it apparently did not occur to anyone to argue that the Court’s interpretation was inconsistent with the INA’s express prohibition of discrimination “because of sex.” That was how our society—and this Court—saw things a half century ago. Discrimination because of sex and discrimination because of sexual orientation were viewed as two entirely different concepts.

To its credit, our society has now come to recognize the injustice of past practices, and this recognition provides the impetus to “update” Title VII. But that is not our job. Our

²⁷Justices Douglas and Fortas thought that a homosexual is merely “one, who by some freak, is the product of an arrested development.” *Boutilier*, 387 U. S., at 127 (Douglas, J., dissenting); see also *id.*, at 125 (Brennan, J., dissenting) (based on lower court dissent).

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duty is to understand what the terms of Title VII were understood to mean when enacted, and in doing so, we must take into account the societal norms of that time. We must therefore ask whether ordinary Americans in 1964 would have thought that discrimination because of “sex” carried some exotic meaning under which private-sector employers would be prohibited from engaging in a practice that represented the official policy of the Federal Government with respect to its own employees. We must ask whether Americans at that time would have thought that Title VII banned discrimination against an employee for engaging in conduct that Congress had made a felony and a ground for civil commitment.

The questions answer themselves. Even if discrimination based on sexual orientation or gender identity could be squeezed into some arcane understanding of sex discrimination, the context in which Title VII was enacted would tell us that this is not what the statute’s terms were understood to mean at that time. To paraphrase something Justice Scalia once wrote, “our job is not to scavenge the world of English usage to discover whether there is any possible meaning” of discrimination because of sex that might be broad enough to encompass discrimination because of sexual orientation or gender identity. *Chisom v. Roemer*, 501 U. S. 380, 410 (1991) (dissenting opinion). Without strong evidence to the contrary (and there is none here), our job is to ascertain and apply the “ordinary meaning” of the statute. *Ibid.* And in 1964, ordinary Americans most certainly would not have understood Title VII to ban discrimination because of sexual orientation or gender identity.

The Court makes a tiny effort to suggest that at least some people in 1964 might have seen what Title VII really means. *Ante*, at 26. What evidence does it adduce? One complaint filed in 1969, another filed in 1974, and arguments made in the mid-1970s about the meaning of the Equal Rights Amendment. *Ibid.* To call this evidence

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merely feeble would be generous.

C

While Americans in 1964 would have been shocked to learn that Congress had enacted a law prohibiting sexual orientation discrimination, they would have been bewildered to hear that this law also forbids discrimination on the basis of “transgender status” or “gender identity,” terms that would have left people at the time scratching their heads. The term “transgender” is said to have been coined “in the early 1970s,”²⁸ and the term “gender identity,” now understood to mean “[a]n internal sense of being male, female or something else,”²⁹ apparently first appeared in an academic article in 1964.³⁰ Certainly, neither term was in common parlance; indeed, dictionaries of the time still primarily defined the word “gender” by reference to grammatical classifications. See, e.g., American Heritage Dictionary, at 548 (def. 1(a)) (“Any set of two or more categories, such as masculine, feminine, and neuter, into which words are divided . . . and that determine agreement with or the

²⁸Drescher, *Transsexualism, Gender Identity Disorder and the DSM*, 14 *J. Gay & Lesbian Mental Health* 109, 110 (2010).

²⁹American Psychological Association, 49 *Monitor on Psychology*, at 32.

³⁰Green, Robert Stoller’s *Sex and Gender: 40 Years On*, 39 *Archives Sexual Behav.* 1457 (2010); see Stoller, *A Contribution to the Study of Gender Identity*, 45 *Int’l J. Psychoanalysis* 220 (1964). The term appears to have been coined a year or two earlier. See Haig, *The Inexorable Rise of Gender and the Decline of Sex: Social Change in Academic Titles, 1945–2001*, 33 *Archives Sexual Behav.* 87, 93 (2004) (suggesting the term was first introduced at 23rd International Psycho-Analytical Congress in Stockholm in 1963); J. Meyerowitz, *How Sex Changed* 213 (2002) (referring to founding of “Gender Identity Research Clinic” at UCLA in 1962). In his book, *Sex and Gender*, published in 1968, Robert Stoller referred to “*gender identity*” as “a working term” “associated with” his research team but noted that they were not “fixed on copyrighting the term or on defending the concept as one of the splendors of the scientific world.” *Sex and Gender*, p. viii.

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selection of modifiers, referents, or grammatical forms”).

While it is likely true that there have always been individuals who experience what is now termed “gender dysphoria,” *i.e.*, “[d]iscomfort or distress related to an incongruence between an individual’s gender identity and the gender assigned at birth,”³¹ the current understanding of the concept postdates the enactment of Title VII. Nothing resembling what is now called gender dysphoria appeared in either DSM–I (1952) or DSM–II (1968). It was not until 1980 that the APA, in DSM–III, recognized two main psychiatric diagnoses related to this condition, “Gender Identity Disorder of Childhood” and “Transsexualism” in adolescents and adults.³² DSM–III, at 261–266.

The first widely publicized sex reassignment surgeries in the United States were not performed until 1966,³³ and the great majority of physicians surveyed in 1969 thought that an individual who sought sex reassignment surgery was either “severely neurotic” or “psychotic.”³⁴

It defies belief to suggest that the public meaning of discrimination because of sex in 1964 encompassed discrimination on the basis of a concept that was essentially unknown to the public at that time.

D

1

The Court’s main excuse for entirely ignoring the social context in which Title VII was enacted is that the meaning of Title VII’s prohibition of discrimination because of sex is

³¹American Psychological Association, 49 Monitor on Psychology, at 32.

³²See Drescher, *supra*, at 112.

³³Buckley, A Changing of Sex by Surgery Begun at Johns Hopkins, N. Y. Times, Nov. 21, 1966, p. 1, col. 8; see also J. Meyerowitz, How Sex Changed 218–220 (2002).

³⁴Drescher, *supra*, at 112 (quoting Green, Attitudes Toward Transsexualism and Sex-Reassignment Procedures, in Transsexualism and Sex Reassignment 241–242 (R. Green & J. Money eds. 1969)).

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clear, and therefore it simply does not matter whether people in 1964 were “smart enough to realize” what its language means. *Hively*, 853 F. 3d, at 357 (Posner, J., concurring). According to the Court, an argument that looks to the societal norms of those times represents an impermissible attempt to displace the statutory language. *Ante*, at 25–26.

The Court’s argument rests on a false premise. As already explained at length, the text of Title VII does not prohibit discrimination because of sexual orientation or gender identity. And what the public thought about those issues in 1964 is relevant and important, not because it provides a ground for departing from the statutory text, but because it helps to explain what the text was understood to mean when adopted.

In arguing that we must put out of our minds what we know about the time when Title VII was enacted, the Court relies on Justice Scalia’s opinion for the Court in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U. S. 75 (1998). But *Oncale* is nothing like these cases, and no one should be taken in by the majority’s effort to enlist Justice Scalia in its updating project.

The Court’s unanimous decision in *Oncale* was thoroughly unremarkable. The Court held that a male employee who alleged that he had been sexually harassed at work by other men stated a claim under Title VII. Although the impetus for Title VII’s prohibition of sex discrimination was to protect women, anybody reading its terms would immediately appreciate that it applies equally to both sexes, and by the time *Oncale* reached the Court, our precedent already established that sexual harassment may constitute sex discrimination within the meaning of Title VII. See *Meritor Savings Bank, FSB v. Vinson*, 477 U. S. 57 (1986). Given these premises, syllogistic reasoning dictated the holding.

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What today’s decision latches onto are *Oncale*’s comments about whether “‘male-on-male sexual harassment’” was on Congress’s mind when it enacted Title VII. *Ante*, at 28 (quoting 523 U. S., at 79). The Court in *Oncale* observed that this specific type of behavior “was assuredly not the *principal evil* Congress was concerned with when it enacted Title VII,” but it found that immaterial because “statutory prohibitions often go beyond the *principal evil* to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the *principal concerns* of our legislators by which we are governed.” 523 U. S., at 79 (emphasis added).

It takes considerable audacity to read these comments as committing the Court to a position on deep philosophical questions about the meaning of language and their implications for the interpretation of legal rules. These comments are better understood as stating mundane and uncontroversial truths. Who would argue that a statute applies only to the “principal evils” and not lesser evils that fall within the plain scope of its terms? Would even the most ardent “purposivists” and fans of legislative history contend that congressional intent is restricted to Congress’s “*principal concerns*”?

Properly understood, *Oncale* does not provide the slightest support for what the Court has done today. For one thing, it would be a wild understatement to say that discrimination because of sexual orientation and transgender status was not the “principal evil” on Congress’s mind in 1964. Whether we like to admit it now or not, in the thinking of Congress and the public at that time, such discrimination would not have been evil at all.

But the more important difference between these cases and *Oncale* is that here the interpretation that the Court adopts does not fall within the ordinary meaning of the statutory text as it would have been understood in 1964. To

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decide for the defendants in *Oncale*, it would have been necessary to carve out an exception to the statutory text. Here, no such surgery is at issue. Even if we totally disregard the societal norms of 1964, the text of Title VII does not support the Court’s holding. And the reasoning of *Oncale* does not preclude or counsel against our taking those norms into account. They are relevant, not for the purpose of creating an exception to the terms of the statute, but for the purpose of better appreciating how those terms would have been understood at the time.

2

The Court argues that two other decisions—*Phillips v. Martin Marietta Corp.*, 400 U. S. 542 (1971) (*per curiam*), and *Los Angeles Dept. of Water and Power v. Manhart*, 435 U. S. 702 (1978)—buttress its decision, but those cases merely held that Title VII prohibits employer conduct that plainly constitutes discrimination because of biological sex. In *Phillips*, the employer treated women with young children less favorably than men with young children. In *Manhart*, the employer required women to make larger pension contributions than men. It is hard to see how these holdings assist the Court.

The Court extracts three “lessons” from *Phillips*, *Manhart*, and *Oncale*, but none sheds any light on the question before us. The first lesson is that “it’s irrelevant what an employer might call its discriminatory practice, how others might label it, or what else might motivate it.” *Ante*, at 14. This lesson is obviously true but proves nothing. As to the label attached to a practice, has anyone ever thought that the application of a law to a person’s conduct depends on how it is labeled? Could a bank robber escape conviction by saying he was engaged in asset enhancement? So if an employer discriminates because of sex, the employer is liable no matter what it calls its conduct, but if the employer’s

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conduct is not sex discrimination, the statute does not apply. Thus, this lesson simply takes us back to the question whether discrimination because of sexual orientation or gender identity is a form of discrimination because of biological sex. For reasons already discussed, see Part I–A, *supra*, it is not.

It likewise proves nothing of relevance here to note that an employer cannot escape liability by showing that discrimination on a prohibited ground was not its sole motivation. So long as a prohibited ground was a motivating factor, the existence of other motivating factors does not defeat liability.

The Court makes much of the argument that “[i]n *Phillips*, the employer could have accurately spoken of its policy as one based on ‘motherhood.’” *Ante*, at 14; see also *ante*, at 16. But motherhood, by definition, is a condition that can be experienced only by women, so a policy that distinguishes between motherhood and parenthood is necessarily a policy that draws a sex-based distinction. There was sex discrimination in *Phillips*, because women with children were treated disadvantageously compared to men with children.

Lesson number two—“the plaintiff’s sex need not be the sole or primary cause of the employer’s adverse action,” *ante*, at 14—is similarly unhelpful. The standard of causation in these cases is whether sex is necessarily a “motivating factor” when an employer discriminates on the basis of sexual orientation or gender identity. 42 U. S. C. §2000e–2(m). But the essential question—whether discrimination because of sexual orientation or gender identity constitutes sex discrimination—would be the same no matter what causation standard applied. The Court’s extensive discussion of causation standards is so much smoke.

Lesson number three—“an employer cannot escape liability by demonstrating that it treats males and females comparably as groups,” *ante*, at 15, is also irrelevant. There

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is no dispute that discrimination against an individual employee based on that person’s sex cannot be justified on the ground that the employer’s treatment of the average employee of that sex is at least as favorable as its treatment of the average employee of the opposite sex. Nor does it matter if an employer discriminates against only a subset of men or women, where the same subset of the opposite sex is treated differently, as in *Phillips*. That is not the issue here. An employer who discriminates equally on the basis of sexual orientation or gender identity applies the same criterion to every affected *individual* regardless of sex. See Part I–A, *supra*.

III

A

Because the opinion of the Court flies a textualist flag, I have taken pains to show that it cannot be defended on textualist grounds. But even if the Court’s textualist argument were stronger, that would not explain today’s decision. Many Justices of this Court, both past and present, have not espoused or practiced a method of statutory interpretation that is limited to the analysis of statutory text. Instead, when there is ambiguity in the terms of a statute, they have found it appropriate to look to other evidence of “congressional intent,” including legislative history.

So, why in these cases are congressional intent and the legislative history of Title VII totally ignored? Any assessment of congressional intent or legislative history seriously undermines the Court’s interpretation.

B

As the Court explained in *General Elec. Co. v. Gilbert*, 429 U. S. 125, 143 (1976), the legislative history of Title VII’s prohibition of sex discrimination is brief, but it is nevertheless revealing. The prohibition of sex discrimination was “added to Title VII at the last minute on the floor of the

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House of Representatives,” *Meritor Savings Bank*, 477 U. S., at 63, by Representative Howard Smith, the Chairman of the Rules Committee. See 110 Cong. Rec. 2577 (1964). Representative Smith had been an ardent opponent of the civil rights bill, and it has been suggested that he added the prohibition against discrimination on the basis of “sex” as a poison pill. See, e.g., *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081, 1085 (CA7 1984). On this theory, Representative Smith thought that prohibiting employment discrimination against women would be unacceptable to Members who might have otherwise voted in favor of the bill and that the addition of this prohibition might bring about the bill’s defeat.³⁵ But if Representative Smith had been looking for a poison pill, prohibiting discrimination on the basis of sexual orientation or gender identity would have been far more potent. However, neither Representative Smith nor any other Member said one word about the possibility that the prohibition of sex discrimination might have that meaning. Instead, all the debate concerned discrimination on the basis of biological sex.³⁶ See 110 Cong. Rec. 2577–2584.

Representative Smith’s motivations are contested, 883 F. 3d, at 139–140 (Lynch, J., dissenting), but whatever they

³⁵See Osterman, *Origins of a Myth: Why Courts, Scholars, and the Public Think Title VII’s Ban on Sex Discrimination Was an Accident*, 20 *Yale J. L. & Feminism* 409, 409–410 (2009).

³⁶Recent scholarship has linked the adoption of the Smith Amendment to the broader campaign for women’s rights that was underway at the time. *E.g.*, Osterman, *supra*; Freeman, *How Sex Got Into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 *L. & Ineq.* 163 (1991); Barzilay, *Parenting Title VII: Rethinking the History of the Sex Discrimination Provision*, 28 *Yale J. L. & Feminism* 55 (2016); Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 *Duquesne L. Rev.* 453 (1981). None of these studies has unearthed evidence that the amendment was understood to apply to discrimination because of sexual orientation or gender identity.

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were, the meaning of *the adoption of the prohibition of sex discrimination* is clear. It was no accident. It grew out of “a long history of women’s rights advocacy that had increasingly been gaining mainstream recognition and acceptance,” and it marked a landmark achievement in the path toward fully equal rights for women. *Id.*, at 140. “Discrimination against gay women and men, by contrast, was not on the table for public debate . . . [i]n those dark, pre-Stonewall days.” *Ibid.*

For those who regard congressional intent as the touchstone of statutory interpretation, the message of Title VII’s legislative history cannot be missed.

C

Post-enactment events only clarify what was apparent when Title VII was enacted. As noted, bills to add “sexual orientation” to Title VII’s list of prohibited grounds were introduced in every Congress beginning in 1975, see *supra*, at 2, and two such bills were before Congress in 1991³⁷ when it made major changes in Title VII. At that time, the three Courts of Appeals to reach the issue had held that Title VII does not prohibit discrimination because of sexual orientation,³⁸ two other Circuits had endorsed that interpretation in dicta,³⁹ and no Court of Appeals had held otherwise. Similarly, the three Circuits to address the application of Title VII to transgender persons had all rejected the argument

³⁷H. R. 1430, 102d Cong., 1st Sess., §2(d) (as introduced in the House on Mar. 13, 1991); S. 574, 102d Cong., 1st Sess., §5 (as introduced in the Senate on Mar. 6, 1991).

³⁸See *Williamson v. A. G. Edwards & Sons, Inc.*, 876 F. 2d 69, 70 (CA8 1989) (*per curiam*), cert. denied, 493 U. S. 1089 (1990); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F. 2d 327, 329–330 (CA9 1979); *Blum v. Gulf Oil Corp.*, 597 F. 2d 936, 938 (CA5 1979) (*per curiam*).

³⁹*Ruth v. Children’s Med. Ctr.*, 1991 WL 151158, *5 (CA6, Aug. 8, 1991) (*per curiam*); *Ulane v. Eastern Airlines, Inc.*, 742 F. 2d 1081, 1084–1085 (CA7 1984), cert. denied, 471 U. S. 1017 (1985).

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that it covered discrimination on this basis.⁴⁰ These were also the positions of the EEOC.⁴¹ In enacting substantial changes to Title VII, the 1991 Congress abrogated numerous judicial decisions with which it disagreed. If it also disagreed with the decisions regarding sexual orientation and transgender discrimination, it could have easily overruled those as well, but it did not do so.⁴²

After 1991, six other Courts of Appeals reached the issue of sexual orientation discrimination, and until 2017, every single Court of Appeals decision understood Title VII's prohibition of "discrimination because of sex" to mean discrimination because of biological sex. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F. 3d 252, 259 (CA1 1999); *Simonton v. Runyon*, 232 F. 3d 33, 36 (CA2 2000); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F. 3d 257, 261 (CA3 2001), cert. denied, 534 U. S. 1155 (2002); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F. 3d 138, 143 (CA4 1996); *Hamm v. Weyauwega Milk Products, Inc.*, 332 F. 3d 1058, 1062 (CA7 2003); *Medina v. Income Support Div., N. M.*, 413 F. 3d 1131, 1135 (CA10 2005); *Evans v. Georgia Regional Hospital*, 850 F. 3d 1248, 1255 (CA11), cert. denied, 583 U. S. ____ (2017). Similarly, the other Circuit to formally address whether Title VII applies to claims of discrimination based on transgender status had also rejected the argument, creating unanimous consensus prior to the Sixth Circuit's decision below. See *Etsitty v. Utah Transit Authority*, 502 F. 3d 1215, 1220–1221 (CA10

⁴⁰ See *Ulane*, 742 F. 2d, at 1084–1085; *Sommers v. Budget Mktg., Inc.*, 667 F. 2d 748, 750 (CA8 1982) (*per curiam*); *Holloway v. Arthur Andersen & Co.*, 566 F. 2d 659, 661–663 (CA9 1977).

⁴¹ *Dillon v. Frank*, 1990 WL 1111074, *3–*4 (EEOC, Feb. 14, 1990); *LaBate v. USPS*, 1987 WL 774785, *2 (EEOC, Feb. 11, 1987).

⁴² In more recent legislation, when Congress has wanted to reach acts committed because of sexual orientation or gender identity, it has referred to those grounds by name. See, e.g., 18 U. S. C. §249(a)(2)(A) (hate crimes) (enacted 2009); 34 U. S. C. §12291(b)(13)(A) (certain federally funded programs) (enacted 2013).

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2007).

The Court observes that “[t]he people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms,” *ante*, at 24, but it has no qualms about disregarding over 50 years of uniform judicial interpretation of Title VII’s plain text. Rather, the Court makes the jaw-dropping statement that its decision exemplifies “judicial humility.” *Ante*, at 31. Is it humble to maintain, not only that Congress did not understand the terms it enacted in 1964, but that all the Circuit Judges on all the pre-2017 cases could not see what the phrase discrimination “because of sex” really means? If today’s decision is humble, it is sobering to imagine what the Court might do if it decided to be bold.

IV

What the Court has done today—interpreting discrimination because of “sex” to encompass discrimination because of sexual orientation or gender identity—is virtually certain to have far-reaching consequences. Over 100 federal statutes prohibit discrimination because of sex. See Appendix C, *infra*; e.g., 20 U. S. C. §1681(a) (Title IX); 42 U. S. C. §3631 (Fair Housing Act); 15 U. S. C. 1691(a)(1) (Equal Credit Opportunity Act). The briefs in these cases have called to our attention the potential effects that the Court’s reasoning may have under some of these laws, but the Court waves those considerations aside. As to Title VII itself, the Court dismisses questions about “bathrooms, locker rooms, or anything else of the kind.” *Ante*, at 31. And it declines to say anything about other statutes whose terms mirror Title VII’s.

The Court’s brusque refusal to consider the consequences of its reasoning is irresponsible. If the Court had allowed the legislative process to take its course, Congress would have had the opportunity to consider competing interests and might have found a way of accommodating at least

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some of them. In addition, Congress might have crafted special rules for some of the relevant statutes. But by intervening and proclaiming categorically that employment discrimination based on sexual orientation or gender identity is simply a form of discrimination because of sex, the Court has greatly impeded—and perhaps effectively ended—any chance of a bargained legislative resolution. Before issuing today’s radical decision, the Court should have given some thought to where its decision would lead.

As the briefing in these cases has warned, the position that the Court now adopts will threaten freedom of religion, freedom of speech, and personal privacy and safety. No one should think that the Court’s decision represents an unalloyed victory for individual liberty.

I will briefly note some of the potential consequences of the Court’s decision, but I do not claim to provide a comprehensive survey or to suggest how any of these issues should necessarily play out under the Court’s reasoning.⁴³

“[B]athrooms, locker rooms, [and other things] of [that] kind.” The Court may wish to avoid this subject, but it is a matter of concern to many people who are reticent about disrobing or using toilet facilities in the presence of individuals whom they regard as members of the opposite sex. For some, this may simply be a question of modesty, but for others, there is more at stake. For women who have been victimized by sexual assault or abuse, the experience of seeing an unclothed person with the anatomy of a male in a confined and sensitive location such as a bathroom or locker room can cause serious psychological harm.⁴⁴

Under the Court’s decision, however, transgender persons will be able to argue that they are entitled to use a bathroom or locker room that is reserved for persons of the

⁴³ Contrary to the implication in the Court’s opinion, I do not label these potential consequences “undesirable.” *Ante*, at 31. I mention them only as possible implications of the Court’s reasoning.

⁴⁴ Brief for Defend My Privacy et al. as *Amici Curiae* 7–10.

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sex with which they identify, and while the Court does not define what it means by a transgender person, the term may apply to individuals who are “gender fluid,” that is, individuals whose gender identity is mixed or changes over time.⁴⁵ Thus, a person who has not undertaken any physical transitioning may claim the right to use the bathroom or locker room assigned to the sex with which the individual identifies at that particular time. The Court provides no clue why a transgender person’s claim to such bathroom or locker room access might not succeed.

A similar issue has arisen under Title IX, which prohibits sex discrimination by any elementary or secondary school and any college or university that receives federal financial assistance.⁴⁶ In 2016, a Department of Justice advisory warned that barring a student from a bathroom assigned to individuals of the gender with which the student identifies constitutes unlawful sex discrimination,⁴⁷ and some lower court decisions have agreed. See *Whitaker v. Kenosha Unified School Dist. No. 1 Bd. of Ed.*, 858 F. 3d 1034, 1049 (CA7 2017); *G. G. v. Gloucester Cty. School Bd.*, 822 F. 3d 709, 715 (CA4 2016), vacated and remanded, 580 U. S. ____ (2017); *Adams v. School Bd. of St. Johns Cty.*, 318 F. Supp. 3d 1293, 1325 (MD Fla. 2018); cf. *Doe v. Boyertown Area*

⁴⁵See 1 Sadock, *Comprehensive Textbook of Psychiatry*, at 2063 (explaining that “gender is now often regarded as more *fluid*” and “[t]hus, gender identity may be described as masculine, feminine, or somewhere in between”).

⁴⁶Title IX makes it unlawful to discriminate on the basis of sex in education: “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.” 20 U. S. C. §1681(a).

⁴⁷See Dept. of Justice & Dept. of Education, *Dear Colleague Letter on Transgender Students*, May 13, 2016 (Dear Colleague Letter), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf>.

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School Dist., 897 F. 3d 518, 533 (CA3 2018), cert. denied, 587 U. S. ____ (2019).

Women’s sports. Another issue that may come up under both Title VII and Title IX is the right of a transgender individual to participate on a sports team or in an athletic competition previously reserved for members of one biological sex.⁴⁸ This issue has already arisen under Title IX, where it threatens to undermine one of that law’s major achievements, giving young women an equal opportunity to participate in sports. The effect of the Court’s reasoning may be to force young women to compete against students who have a very significant biological advantage, including students who have the size and strength of a male but identify as female and students who are taking male hormones in order to transition from female to male. See, e.g., Complaint in *Soule v. Connecticut Assn. of Schools*, No. 3:20–cv–00201 (D Conn., Apr. 17, 2020) (challenging Connecticut policy allowing transgender students to compete in girls’ high school sports); Complaint in *Hecox v. Little*, No. 1:20–cv–00184 (D Idaho, Apr. 15, 2020) (challenging state law that bars transgender students from participating in school sports in accordance with gender identity). Students in these latter categories have found success in athletic competitions reserved for females.⁴⁹

⁴⁸A regulation allows single-sex teams, 34 CFR §106.41(b) (2019), but the statute itself would of course take precedence.

⁴⁹“[S]ince 2017, two biological males [in Connecticut] have collectively won 15 women’s state championship titles (previously held by ten different Connecticut girls) against biologically female track athletes.” Brief for Independent Women’s Forum et al. as *Amici Curiae* in No. 18–107, pp. 14–15.

At the college level, a transgendered woman (biological male) switched from competing on the men’s Division II track team to the women’s Division II track team at Franklin Pierce University in New Hampshire after taking a year of testosterone suppressants. While this student had placed “eighth out of nine male athletes in the 400 meter hurdles the

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The logic of the Court’s decision could even affect professional sports. Under the Court’s holding that Title VII prohibits employment discrimination because of transgender status, an athlete who has the physique of a man but identifies as a woman could claim the right to play on a women’s professional sports team. The owners of the team might try to claim that biological sex is a bona fide occupational qualification (BFOQ) under 42 U. S. C. §2000e–2(e), but the BFOQ exception has been read very narrowly. See *Dothard v. Rawlinson*, 433 U. S. 321, 334 (1977).

Housing. The Court’s decision may lead to Title IX cases against any college that resists assigning students of the opposite biological sex as roommates. A provision of Title IX, 20 U. S. C. §1686, allows schools to maintain “separate living facilities for the different sexes,” but it may be argued that a student’s “sex” is the gender with which the student identifies.⁵⁰ Similar claims may be brought under the Fair Housing Act. See 42 U. S. C. §3604.

Employment by religious organizations. Briefs filed by a wide range of religious groups—Christian, Jewish, and Muslim—express deep concern that the position now adopted by the Court “will trigger open conflict with faith-

year before, the student won the women’s competition by over a second and a half—a time that had garnered tenth place in the men’s conference meet just three years before.” *Id.*, at 15.

A transgender male—*i.e.*, a biological female who was in the process of transitioning to male and actively taking testosterone injections—won the Texas girls’ state championship in high school wrestling in 2017. Babb, *Transgender Issue Hits Mat in Texas*, *Washington Post*, Feb. 26, 2017, p. A1, col. 1.

⁵⁰ Indeed, the 2016 advisory letter issued by the Department of Justice took the position that under Title IX schools “must allow transgender students to access housing consistent with their gender identity.” *Dear Colleague Letter 4*.

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based employment practices of numerous churches, synagogues, mosques, and other religious institutions.”⁵¹ They argue that “[r]eligious organizations need employees who actually live the faith,”⁵² and that compelling a religious organization to employ individuals whose conduct flouts the tenets of the organization’s faith forces the group to communicate an objectionable message.

This problem is perhaps most acute when it comes to the employment of teachers. A school’s standards for its faculty “communicate a particular way of life to its students,” and a “violation by the faculty of those precepts” may undermine the school’s “moral teaching.”⁵³ Thus, if a religious school teaches that sex outside marriage and sex reassignment procedures are immoral, the message may be lost if the school employs a teacher who is in a same-sex relationship or has undergone or is undergoing sex reassignment. Yet today’s decision may lead to Title VII claims by such teachers and applicants for employment.

At least some teachers and applicants for teaching positions may be blocked from recovering on such claims by the “ministerial exception” recognized in *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U. S. 171 (2012). Two cases now pending before the Court present the question whether teachers who provide religious instruction can be considered to be “ministers.”⁵⁴ But even if teachers with those responsibilities qualify, what about other very visible school employees who may not qualify for

⁵¹ Brief for National Association of Evangelicals et al. as *Amici Curiae* 3; see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, pp. 8–18.

⁵² Brief for National Association of Evangelicals et al. as *Amici Curiae* 7.

⁵³ McConnell, *Academic Freedom in Religious Colleges and Universities*, 53 *Law & Contemp. Prob.* 303, 322 (1990).

⁵⁴ See *Our Lady of Guadalupe School v. Morrissey-Berru*, No. 19–267; *St. James School v. Biel*, No. 19–348.

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the ministerial exception? Provisions of Title VII provide exemptions for certain religious organizations and schools “with respect to the employment of individuals of a particular religion to perform work connected with the carrying on” of the “activities” of the organization or school, 42 U. S. C. §2000e–1(a); see also §2000e–2(e)(2), but the scope of these provisions is disputed, and as interpreted by some lower courts, they provide only narrow protection.⁵⁵

Healthcare. Healthcare benefits may emerge as an intense battleground under the Court’s holding. Transgender employees have brought suit under Title VII to challenge employer-provided health insurance plans that do not cover costly sex reassignment surgery.⁵⁶ Similar claims have been brought under the Affordable Care Act (ACA), which broadly prohibits sex discrimination in the provision of healthcare.⁵⁷

⁵⁵See, e.g., *EEOC v. Kamehameha Schools/Bishop Estate*, 990 F. 2d 458, 460 (CA9 1993); *EEOC v. Fremont Christian School*, 781 F. 2d 1362, 1365–1367 (CA9 1986); *Rayburn v. General Conference of Seventh-day Adventists*, 772 F. 2d 1164, 1166 (CA4 1985); *EEOC v. Mississippi College*, 626 F. 2d 477, 484–486 (CA5 1980); see also Brief for United States Conference of Catholic Bishops et al. as *Amici Curiae* in No. 18–107, at 30, n. 28 (discussing disputed scope). In addition, 42 U. S. C. §2000e–2(e)(1) provides that religion may be a BFOQ, and allows religious schools to hire religious employees, but as noted, the BFOQ exception has been read narrowly. See *supra*, at 48.

⁵⁶See, e.g., Amended Complaint in *Toomey v. Arizona*, No. 4:19–cv–00035 (D Ariz., Mar. 2, 2020). At least one District Court has already held that a state health insurance policy that does not provide coverage for sex reassignment surgery violates Title VII. *Fletcher v. Alaska*, ___ F. Supp. 3d ___, ___, 2020 WL 2487060, *5 (D Alaska, Mar. 6, 2020).

⁵⁷See, e.g., Complaint in *Conforti v. St. Joseph’s Healthcare System*, No. 2:17–cv–00050 (D NJ, Jan. 5, 2017) (transgender man claims discrimination under the ACA because a Catholic hospital refused to allow a surgeon to perform a hysterectomy). And multiple District Courts have already concluded that the ACA requires health insurance coverage for sex reassignment surgery and treatment. *Kadel v. Folwell*, ___ F. Supp. 3d ___, ___, 2020 WL 1169271, *12 (MDNC, Mar. 11, 2020) (allowing

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Such claims present difficult religious liberty issues because some employers and healthcare providers have strong religious objections to sex reassignment procedures, and therefore requiring them to pay for or to perform these procedures will have a severe impact on their ability to honor their deeply held religious beliefs.

Freedom of speech. The Court’s decision may even affect the way employers address their employees and the way teachers and school officials address students. Under established English usage, two sets of sex-specific singular personal pronouns are used to refer to someone in the third person (he, him, and his for males; she, her, and hers for females). But several different sets of gender-neutral pronouns have now been created and are preferred by some individuals who do not identify as falling into either of the two traditional categories.⁵⁸ Some jurisdictions, such as

claims of discrimination under ACA, Title IX, and Equal Protection Clause); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 952–954 (D Minn. 2018) (allowing ACA claim).

Section 1557 of the ACA, 42 U. S. C. §18116, provides:

“Except as otherwise provided for in this title (or an amendment made by this title), an individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U. S. C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U. S. C. 1681 et seq.), the Age Discrimination Act of 1975 (42 U. S. C. 6101 et seq.), or section 794 of title 29, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments). The enforcement mechanisms provided for and available under such title VI, title IX, section 794, or such Age Discrimination Act shall apply for purposes of violations of this subsection.” (Footnote omitted.)

⁵⁸See, e.g., University of Wisconsin Milwaukee Lesbian, Gay, Bisexual, Transgender, Queer Plus (LGBTQ+) Resource Center, Gender Pronouns (2020), <https://uwm.edu/lgbtrc/support/gender-pronouns/> (listing six new categories of pronouns: (f)ae, (f)aer, (f)aers; e/ey, em, eir, eirs; per, pers;

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New York City, have ordinances making the failure to use an individual’s preferred pronoun a punishable offense,⁵⁹ and some colleges have similar rules.⁶⁰ After today’s decision, plaintiffs may claim that the failure to use their preferred pronoun violates one of the federal laws prohibiting sex discrimination. See *Prescott v. Rady Children’s Hospital San Diego*, 265 F. Supp. 3d 1090, 1098–1100 (SD Cal. 2017) (hospital staff’s refusal to use preferred pronoun violates ACA).⁶¹

The Court’s decision may also pressure employers to suppress any statements by employees expressing disapproval of same-sex relationships and sex reassignment procedures. Employers are already imposing such restrictions voluntarily, and after today’s decisions employers will fear

ve, ver, vis; xe, xem, xyr, xyrs; ze/zie, hir, hirs).

⁵⁹See 47 N. Y. C. R. R. §2–06(a) (2020) (stating that a “deliberate refusal to use an individual’s self-identified name, pronoun and gendered title” is a violation of N. Y. C. Admin. Code §8–107 “where the refusal is motivated by the individual’s gender”); see also N. Y. C. Admin. Code §§8–107(1), (4), (5) (2020) (making it unlawful to discriminate on the basis of “gender” in employment, housing, and public accommodations); cf. D. C. Mun. Regs., tit. 4, §801.1 (2020) (making it “unlawful . . . to discriminate . . . on the basis of . . . actual or perceived gender identity or expression” in “employment, housing, public accommodations, or educational institutions” and further proscribing “engaging in verbal . . . harassment”).

⁶⁰See University of Minn., Equity and Access: Gender Identity, Gender Expression, Names, and Pronouns, Administrative Policy (Dec. 11, 2019), <https://policy.umn.edu/operations/genderequity> (“University members and units are expected to use the names, gender identities, and pronouns specified to them by other University members, except as legally required”); *Meriwether v. Trustees of Shawnee State Univ.*, 2020 WL 704615, *1 (SD Ohio, Feb. 12, 2020) (rejecting First Amendment challenge to university’s nondiscrimination policy brought by evangelical Christian professor who was subjected to disciplinary actions for failing to use student’s preferred pronouns).

⁶¹Cf. Notice of Removal in *Vlaming v. West Point School Board*, No. 3:19–cv–00773 (ED Va., Oct. 22, 2019) (contending that high school teacher’s firing for failure to use student’s preferred pronouns was based on nondiscrimination policy adopted pursuant to Title IX).

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that allowing employees to express their religious views on these subjects may give rise to Title VII harassment claims.

Constitutional claims. Finally, despite the important differences between the Fourteenth Amendment and Title VII, the Court’s decision may exert a gravitational pull in constitutional cases. Under our precedents, the Equal Protection Clause prohibits sex-based discrimination unless a “heightened” standard of review is met. *Sessions v. Morales-Santana*, 582 U. S. ___, ___ (2017) (slip op., at 8); *United States v. Virginia*, 518 U. S. 515, 532–534 (1996). By equating discrimination because of sexual orientation or gender identity with discrimination because of sex, the Court’s decision will be cited as a ground for subjecting all three forms of discrimination to the same exacting standard of review.

Under this logic, today’s decision may have effects that extend well beyond the domain of federal anti-discrimination statutes. This potential is illustrated by pending and recent lower court cases in which transgender individuals have challenged a variety of federal, state, and local laws and policies on constitutional grounds. See, e.g., Complaint in *Hecox*, No. 1: 20–CV–00184 (state law prohibiting transgender students from competing in school sports in accordance with their gender identity); Second Amended Complaint in *Karnoski v. Trump*, No. 2:17–cv–01297 (WD Wash., July 31, 2019) (military’s ban on transgender members); *Kadel v. Folwell*, ___ F. Supp. 3d ___, ___–___, 2020 WL 1169271, *10–*11 (MDNC, Mar. 11, 2020) (state health plan’s exclusion of coverage for sex reassignment procedures); Complaint in *Gore v. Lee*, No. 3:19–cv–00328 (MD Tenn., Mar. 3, 2020) (change of gender on birth certificates); Brief for Appellee in *Grimm v. Gloucester Cty. School Bd.*, No. 19–1952 (CA4, Nov. 18, 2019) (transgender student forced to use gender neutral bathrooms at school); Complaint in *Corbitt v. Taylor*, No. 2:18–cv–00091 (MD Ala.,

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July 25, 2018) (change of gender on driver’s licenses); *Whitaker*, 858 F. 3d, at 1054 (school policy requiring students to use the bathroom that corresponds to the sex on birth certificate); *Keohane v. Florida Dept. of Corrections Secretary*, 952 F. 3d 1257, 1262–1265 (CA11 2020) (transgender prisoner denied hormone therapy and ability to dress and groom as a female); *Edmo v. Corizon, Inc.*, 935 F. 3d 757, 767 (CA9 2019) (transgender prisoner requested sex reassignment surgery); cf. *Glenn v. Brumby*, 663 F. 3d 1312, 1320 (CA11 2011) (transgender individual fired for gender non-conformity).

Although the Court does not want to think about the consequences of its decision, we will not be able to avoid those issues for long. The entire Federal Judiciary will be mired for years in disputes about the reach of the Court’s reasoning.

* * *

The updating desire to which the Court succumbs no doubt arises from humane and generous impulses. Today, many Americans know individuals who are gay, lesbian, or transgender and want them to be treated with the dignity, consideration, and fairness that everyone deserves. But the authority of this Court is limited to saying what the law *is*.

The Court itself recognizes this:

“The place to make new legislation . . . lies in Congress. When it comes to statutory interpretation, our role is limited to applying the law’s demands as faithfully as we can in the cases that come before us.” *Ante*, at 31.

It is easy to utter such words. If only the Court would live by them.

I respectfully dissent.

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APPENDIXES

A

Webster's New International Dictionary 2296 (2d ed. 1953):

sex (sěks), *n.* [F. *sexe*, fr. L. *sexus*; prob. orig., division, and akin to L. *secare* to cut. See SECTION.] **1.** One of the two divisions of organisms formed on the distinction of male and female; males or females collectively. **2.** The sum of the peculiarities of structure and function that distinguish a male from a female organism; the character of being male or female, or of pertaining to the distinctive function of the male or female in reproduction. *Conjugation*, or *fertilization* (union of germplasm of two individuals), a process evidently of great but not readily explainable importance in the perpetuation of most organisms, seems to be the function of differentiation of sex, which occurs in nearly all organisms at least at some stage in their life history. Sex is manifested in the conjugating cells by the larger size, abundant food material, and immobility of the female gamete (*egg*, *egg cell*, or *ovum*), and the small size and the locomotive power of the male gamete (*spermatozoon* or *spermatozoid*), and in the adult organisms often by many structural, physiological, and (in higher forms) psychological characters, aside from the necessary modification of the reproductive apparatus. Cf. HERMAPHRODITE, 1. In botany the term *sex* is often extended to the distinguishing peculiarities of staminate and pistillate flowers, and hence in dioecious plants to the individuals bearing them.

In many animals and plants the body and germ cells have been shown to contain one or more chromosomes of a special kind (called *sex chromosomes*; *idiochromosomes*; *accessory chromosomes*) in addition to the ordinary paired autosomes. These special chromosomes serve to

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determine sex. In the simplest case, the male germ cells are of two types, one with and one without a single extra chromosome (*X chromosome*, or *monosome*). The egg cells in this case all possess an *X chromosome*, and on fertilization by the two types of sperm, male and female zygotes result, of respective constitution *X*, and *XX*. In many other animals and plants (probably including man) the male organism produces two types of gametes, one possessing an *X chromosome*, the other a *Y chromosome*, these being visibly different members of a pair of chromosomes present in the diploid state. In this case also, the female organism is *XX*, the eggs *X*, and the zygotes respectively male (*XY*) and female (*XX*). In another type of sex determination, as in certain moths and possibly in the fowl, the female produces two kinds of eggs, the male only one kind of sperm. Each type of egg contains one member of a pair of differentiated chromosomes, called respectively *Z chromosomes* and *W chromosomes*, while all the sperm cells contain a *Z chromosome*. In fertilization, union of a *Z* with a *W* gives rise to a female, while union of two *Z* chromosomes produces a male. Cf. SECONDARY SEX CHARACTER.

3. a The sphere of behavior dominated by the relations between male and female. **b** *Psychoanalysis*. By extension, the whole sphere of behavior related even indirectly to the sexual functions and embracing all affectionate and pleasure-seeking conduct.

4. Phenomena of sexual instincts and their manifestations.

5. Sect;—a confused use.

Syn.—SEX, GENDER. SEX refers to physiological distinctions; GENDER, to distinctions in grammar.

—*the sex*. The female sex; women, in general.

sex, *adj.* Based on or appealing to sex.

sex, *v. t.* To determine the sex of, as skeletal remains.

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Webster’s Third New International Dictionary 2081 (1966):

¹**sex** \ˈseks\ n *-ES often attrib* [ME, fr. L *sexus*; prob. akin to L *secare* to cut—more at SAW] **1**: one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2**: the sum of the morphological, physiological, and behavioral peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL’S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX **3**: the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian’s attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney> **4**: the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif*: SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William

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Empson>

²**sex** \“\ vt –ED/–ING/–ES **1**: to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare **AUTOSEXING 2 a**: to increase the sexual appeal or attraction of—usu. used with *up* <titles must be ~ed up to attract 56 million customers—*Time*> **b**: to arouse the sexual instincts or desires of—usu. used with *up* <watching you ~ing up that bar kitten—Oakley Hall>

9 Oxford English Dictionary 577–578 (1933):

Sex (seks), *sb.* Also 6–7 *sexe*, (6 *seex*, 7 *pl. sexe*, 8 *poss. sexe*'s). [ad. L. *sexus* (*u*-stem), whence also F. *sexe* (12th c.), Sp., Pg. *sexo*, It. *sessò*. Latin had also a form *secus* neut. (indeclinable).]

1. Either of the two divisions of organic beings distinguished as male and female respectively; the males or the females (of a species, etc., esp. of the human race) viewed collectively.

1382 WYCLIF *Gen.* vi. 19 Of alle thingis hauynge sowle of ony flehs, two thow shalt brynge into the ark, that maal sex and femaal lyuen with thee. 1532 MORE *Confut. Tindale* II. 152, I had as leue he bare them both a bare cheryte, as wyth the frayle feminyne sexe fall to far in loue. 1559 ALYMER *Harborowe* E 4 b, Neither of them debarred the heires female .. as though it had ben .. vnnatural for that sexe to gouern. 1576 GASCOIGNE *Philomene* xcviij, I speake against my sex. a 1586 SIDNEY *Arcadia* II. (1912) 158 The sexe of womankind of all other is most bound to have regardfull eie to mens judgements. 1600 NASHE *Summer's Last Will* F 3 b, A woman they imagine her to be, Because that sexe keepes nothing close they heare. 1615 CROOKE *Body of Man* 274 If wee respect the .. conformation of both the Sexes, the Male is sooner perfected .. in the wombe. 1634 SIR T. HERBERT *Trav.* 19 Both sexe goe naked. 1667 MILTON *P. L.* IX, 822 To add what wants In Femal Sex. 1671—*Samson* 774 It was a weakness In me, but incident to all our sex. 1679 DRYDEN *Troilus & Cr.* I. ii, A strange dissembling sex we women are. 1711 ADDISON *Spect.* No. 10 ¶ 6 Their Amusements .. are more adapted to the Sex than to the Species. 1730 SWIFT *Let. to Mrs. Whiteway* 28 Dec., You have neither the scrawl nor the spelling of your sex. 1742 GRAY *Propertius* II. 73 She .. Condemns her fickle Sexe's fond Mistake. 1763 G. WILLIAMS in Jesse *Selwyn & Contemp.* (1843) I. 265 It would

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astonish you to see the mixture of sexes at this place. **1780** BENTHAM *Princ. Legisl.* VI. §35 The sensibility of the female sex appears .. to be greater than that of the male. **1814** SCOTT *Ld. of Isles* VI. iii, Her sex's dress regain'd. **1836** THIRLWALL *Greece* xi. II. 51 Solon also made regulations for the government of the other sex. **1846** *Ecclesiologist* Feb. 41 The propriety and necessity of dividing the sexes during the publick offices of the Church. **1848** THACKERAY *Van. Fair* xxv, She was by no means so far superior to her sex as to be above jealousy. **1865** DICKENS *Mut. Fr.* II. i, It was a school for both sexes. **1886** MABEL COLLINS *Prettiest Woman* ii, Zadwiga had not yet given any serious attention to the other sex.

b. collect. followed by plural verb. *rare*.

1768 GOLDSM. *Good. n. Man* IV. (Globe) 632/2 Our sex are like poor tradesmen. **1839** MALCOM *Trav.* (1840) 40/1 Neither sex tattoo any part of their bodies.

c. The fair(er), gentle(r), soft(er), weak(er) sex; the devout sex; the second sex; † the woman sex: the female sex, women. **The † better, sterner sex:** the male sex, men.

[**1583** STUBBES *Anat. Abus.* E vij b, Ye magnificency & liberalitie of that gentle sex. **1613** PURCHAS *Pilgrimage* (1614) 38 Strong Sampson and wise Solomon are witnesses, that the strong men are slaine by this weaker sexe.]

1641 BROME *Jovial Crew* III. (1652) H 4, I am bound by a strong vow to kisse all of the woman sex I meet this morning. **1648** J. BEAUMONT *Psyche* XIV. I, The softer sex, attending Him And his still-growing woes. **1665** SIR T. HERBERT *Trav.* (1677) 22 Whiles the better sex seek prey abroad, the women (therein like themselves) keep home and spin. **1665** BOYLE *Occas. Refl.* v. ix. 176 Persons of the fairer Sex. a **1700** EVELYN *Diary* 12 Nov. an. 1644, The Pillar .. at which the devout sex are always rubbing their chaplets. **1701** STANHOPE *St. Aug. Medit.* I. xxxv. (1704) 82, I may .. not suffer my self to be outdone by the weaker Sex. **1732** [see FAIR a. I b]. **1753** HOGARTH *Anal. Beauty* x. 65 An elegant degree of plumpness peculiar to the skin of the softer sex. **1820** BYRON *Juan* IV. cviii, Benign Ceruleans of the second sex! Who advertise new poems by your looks. **1838** *Murray's Hand-bk. N. Germ.* 430 It is much frequented by the fair sex. **1894** C. D. TYLER in *Geog. Jrnal.* III. 479 They are beardless, and usually wear a shock of unkempt hair, which is somewhat finer in the gentler sex.

¶d. Used occas. with extended notion. The third sex: eunuchs. Also *sarcastically* (see quot. 1873).

1820 BYRON *Juan* IV. lxxxvi, From all the Pope makes yearly, 'twould perplex To find three perfect pipes of the third sex. *Ibid.* V. xxvi, A black old neutral personage Of the third sex stept up. [**1873** LD. HOUGHTON *Monogr.* 280 Sydney Smith .. often spoke with much bitterness of the growing belief in three Sexes of Humanity—Men, Women, and Clergymen.]

e. The sex: the female sex. [F. *le sexe*.] Now *rare*.

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1589 PUTTENHAM *Eng. Poesie* III. xix. (Arb.) 235 As he that had tolde a long tale before certaine noble women, of a matter somewhat in honour touching the Sex. **1608** D. T[UVILL] *Ess. Pol. & Mor.* 101 b, Not yet weighing with himselfe, the weaknesse and imbecillitie of the sex. **1631** MASSINGER *Emperor East* I. ii, I am called The Squire of Dames, or Servant of the Sex. **1697** VANBRUGH *Prov. Wife* II. ii, He has a strange penchant to grow fond of me, in spite of his aversion to the sex. **1760-2** GOLDSM. *Cit. W.* xcix, The men of Asia behave with more deference to the sex than you seem to imagine. **1792** A. YOUNG *Trav. France* I. 220 The sex of Venice are undoubtedly of a distinguished beauty. **1823** BYRON *Juan* XIII. lxxix, We give the sex the *pas*. **1863** R. F. BURTON *W. Africa* I. 22 Going 'up stairs', as the sex says, at 5 a.m. on the day after arrival, I cast the first glance at Funchal.

f. Without *the*, in predicative quasi-adj. use=feminine. *rare*.

a **1700** DRYDEN *Cymon & Iph.* 368 She hugg'd th' Offender, and forgave th' Offence, Sex to the last!

2. Quality in respect of being male or female.

a. With regard to persons or animals.

1526 *Pilgr. Perf.* (W. de. W. 1531) 282 b, Ye bee, whiche neuer gendreth with ony make of his kynde, nor yet hath ony distinct sex. **1577** T. KENDALL *Flowers of Epigr.* 71 b, If by corps supposd may be her seex, then sure a virgin she. **1616** T. SCOTT *Philomythie* I. (ed. 2) A 3 Euen as Hares change shape and sex, some say Once euery yeare. **1658** SIR T. BROWNE *Hydriot.* iii. 18 A critical view of bones makes a good distinction of sexes. **a** **1665** DIGBY *Chym. Secrets* (1682) II. 225 Persons of all Ages and Sexes. **1667** MILTON *P. L.* I. 424 For Spirits when they please can either Sex assume, or both. **1710-11** SWIFT *Jrnl. to Stella* 7 Mar., I find I was mistaken in the sex, 'tis a boy. **1757** SMOLLETT *Reprisal* IV. v, As for me, my sex protects me. **1825** SCOTT *Betrothed* xiii, I am but a poor and neglected woman, feeble both from sex and age. **1841** ELPHINSTONE *Hist. India* I. 349 When persons of different sexes walk together, the woman always follows the man. **1882** TENSION-WOODS *Fish N. S. Wales* 116 Oysters are of distinct sexes.

b. with regard to plants (see FEMALE **a.** 2, MALE **a.** 2).

1567 MAPLET *Gr. Forest* 28 Some seeme to haue both sexes and kindes: as the Oke, the Lawrell and such others. **1631** WIDDOWES *Nat. Philos.* (ed. 2) 49 There be sexes of hearbes .. namely, the Male or Female. **1720** P. BLAIR *Bot. Ess.* iv. 237 These being very evident Proofs of a necessity of two Sexes in Plants as well as in Animals. **1790** SMELLIE *Philos. Nat. Hist.* I. 245 There is not a notion more generally adopted, that that vegetables have the distinction of sexes. **1848** LINDLEY *Introd. Bot.* (ed. 4) II. 80 Change of Sex under the influence of external causes.

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3. The distinction between male and female in general. In recent use often with more explicit notion: The sum of those differences in the structure and function of the reproductive organs on the ground of which beings are distinguished as male and female, and of the other physiological differences consequent on these; the class of phenomena with which these differences are concerned.

Organs of sex: the reproductive organs in sexed animals or plants.

a 1631 DONNE *Songs & Sonn., The Printrose Poems* 1912 I. 61 Should she Be more then woman, she would get above All thought of sexe, and think to move My heart to study her, and not to love. **a 1643** CARTWRIGHT *Siedge* III. vi, My Soul's As Male as yours; there's no Sex in the mind. **1748** MELMOTH *Fitzosborne Lett.* lxii. (1749) II. 119 There may be a kind of sex in the very soul. **1751** HARRIS *Hermes Wks.* (1841) 129 Besides number, another characteristic, visible in substances, is that of sex. **1878** GLADSTONE *Prim. Homer* 68 Athenè .. has nothing of sex except the gender, nothing of the woman except the form. **1887** K. PEARSON *Eth. Freethought* xv. (1888) 429 What is the true type of social (moral) action in matters of sex? **1895** CRACKANTHORPE in *19th Cent.* Apr. 607 (art.) Sex in modern literature. *Ibid.* 614 The writers and readers who have strenuously refused to allow to sex its place in creative art. **1912** H. G. WELLS *Marriage* ii. § 6. 72 The young need .. to be told .. all we know of three fundamental things; the first of which is God, .. and the third Sex.

¶ **4.** Used, by confusion, in senses of SECT (q. v. I, 4 b, 7, and cf. I d *note*).

1575-85 ABP. SANDYS *Serm.* xx. 358 So are all sexes and sorts of people called vpon. **1583** MELBANCKE *Philotimus* L iij b, Whether thinkest thou better sporte & more absurd, to see an Asse play on an harpe contrary to his sex, or heare [etc.]. **1586** J. HOOKER *Hist. Irel.* 180/2 in *Holinshed*, The whole sex of the Oconhours. **1586** T. B. *La Primaud. Fr. Acad.* I. 359 O detestable furie, not to be found in most cruell beasts, which spare the blood of their sexe. **a 1704** T BROWN *Dial. Dead, Friendship Wks.* 1711 IV. 56 We have had enough of these Christians, and sure there can be no worse among the other Sex of Mankind [i.e. Jews and Turks]? **1707** ATTERBURY *Large Vind. Doctr.* 47 Much less can I imagine, why a Jewish Sex (whether of Pharisees or Saducees) should be represented, as [etc.].

5. *attrib. and Comb., as sex-distinction, function, etc.; sex-abusing, transforming* adjs.; sex-cell, a reproductive cell, with either male or female function; a sperm-cell or an egg-cell.

1642 H. MORE *Song of Soul* I. III. lxxi, Mad-making waters, sex trans-forming springs.

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1781 COWPER *Expost.* 415 Sin, that in old time Brought fire from heav'n, the sex-abusing crime. 1876 HARDY *Ethelberta* xxxvii, You cannot have celebrity and sex-privilege both. 1887 *Jrnl. Educ.* No. 210. 29 If this examination craze is to prevail, and the sex-abolitionists are to have their way. 1889 GEDDES & THOMSON *Evol. Sex* 91 Very commonly the sex-cells originate in the ectoderm and ripen there. 1894 H. DRUMMOND *Ascent of Man* 317 The sex-distinction slowly gathers definition. 1897 J. HUTCHINSON in *Arch. Surg.* VIII. 230 Loss of Sex Function.

Sex (seks), *v.* [f. SEX *sb.*] *trans.* To determine the sex of, by anatomical examination; to label as male or female.

1884 GURNEY *Diurnal Birds Prey* 173 The specimen is not sexed, neither is the sex noted on the drawing. 1888 A. NEWTON in *Zoologist* Ser. 111. XII. 101 The .. barbarous phrase of 'collecting a specimen' and then of 'sexing' it.

Concise Oxford Dictionary of Current English 1164 (5th ed. 1964):

sěx, *n.* Being male or female or hermaphrodite (*what is its ~?; ~ does not matter; without distinction of age or ~*), whence ~¹LESS *a.*, ~¹LESSNESS *n.*, ~² *a.*, immoderately concerned with ~; males or females collectively (*all ranks & both ~es; the fair, gentle, softer, weaker, ~, & joc. the ~, women; the sterner ~, men; is the fairest of her ~*); (attrib.) arising from difference, or consciousness, of ~ (~ *antagonism, ~ instinct, ~ urge*); ~ *appeal*, attractiveness arising from difference of ~. [f. L *sexus* -*ūs*; partly thr. F]

Random House Dictionary of the English Language 1307 (1966):

sex (seks), *n.* **1.** The fact or character of being either male or female: *persons of different sex*. **2.** either of the two groups of persons exhibiting this character: *the stronger sex; the gentle sex*. **3.** the sum of the 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 manifestation in life and

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conduct. **5.** coitus. **6. to have sex**, *Informal*. to engage in sexual intercourse. *—v.t.* **7.** to ascertain the sex of, esp. of newly hatched chicks. **8. sex it up**, *Slang*. to neck passionately: *They were really sexing it up last night.* **9. sex up**, *Informal*. **a.** to arouse sexually: *She certainly knows how to sex up the men.* **b.** to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes.* [ME < L *sex(us)*, akin to *secus*, deriv. of *secāre* to cut, divide; see SECTION]

American Heritage Dictionary 1187 (1969):

sex (sěks) *n.* **1. a.** The property or quality by which organisms are classified according to their reproductive functions. **b.** Either of two divisions, designated *male* and *female*, of this classification. **2.** Males or females collectively. **3.** The condition or character of being male or female; the physiological, functional, and psychological differences that distinguish the male and the female. **4.** The sexual urge or instinct as it manifests itself in behavior. **5.** Sexual intercourse. *—tr.v.* **sexed, sexing, sexes.** To determine the sex of (young chickens). [Middle English, from Old French *sexe*, from Latin *sexus*†.]

B

Webster's Third New International Dictionary 2081 (2002):

¹**sex** \ˈseks\ *n* *—ES often attrib* [ME, fr. L *sexus*; prob. akin to L *secare* to cut—more at SAW] **1:** one of the two divisions of organic esp. human beings respectively designated male or female <a member of the opposite ~> **2:** the sum of the morphological, physiological, and behavioral

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peculiarities of living beings that subserves biparental reproduction with its concomitant genetic segregation and recombination which underlie most evolutionary change, that in its typical dichotomous occurrence is usu. genetically controlled and associated with special sex chromosomes, and that is typically manifested as maleness and femaleness with one or the other of these being present in most higher animals though both may occur in the same individual in many plants and some invertebrates and though no such distinction can be made in many lower forms (as some fungi, protozoans, and possibly bacteria and viruses) either because males and females are replaced by mating types or because the participants in sexual reproduction are indistinguishable—compare HETEROTHALLIC, HOMOTHALLIC; FERTILIZATION, MEIOSIS, MENDEL'S LAW; FREEMARTIN, HERMAPHRODITE, INTERSEX

3: the sphere of interpersonal behavior esp. between male and female most directly associated with, leading up to, substituting for, or resulting from genital union <agree that the Christian's attitude toward ~ should not be considered apart from love, marriage, family—M. M. Forney>

4: the phenomena of sexual instincts and their manifestations <with his customary combination of philosophy, insight, good will toward the world, and entertaining interest in ~—Allen Drury> <studying and assembling what modern scientists have discovered about ~—*Time*>; *specif:* SEXUAL INTERCOURSE <an old law imposing death for ~ outside marriage—William Empson>

²**sex** \“\ *vt* –ED/–ING/–ES **1:** to determine the sex of (an organic being) <it is difficult to ~ the animals at a distance—E. A. Hooton>—compare AUTOSEXING **2 a:** to increase the sexual appeal or attraction of—usu. used with *up* <titles must be ~ed up to attract 56 million customers—*Time*> **b:** to arouse the sexual instincts or desires of—usu. used with *up* <watching you ~ing up that bar kitten—Oakley Hall>

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Random House Webster's Unabridged Dictionary 1754 (2d ed. 2001):

Sex (seks), *n.* **1.** either the male or female division of a species, esp. as differentiated with reference to the reproductive functions. **2.** the sum of the structural and functional differences by which the male and female are distinguished, or the phenomena or behavior dependent on these differences. **3.** the instinct or attraction drawing one sex toward another, or its manifestation in life and conduct. **4.** coitus. **5.** genitalia. **6. to have sex**, to engage in sexual intercourse. – *v.t.* **7.** to ascertain the sex of, esp. of newly-hatched chicks. **8. sex up**, *Informal.* **a.** to arouse sexually: *The only intent of that show was to sex up the audience.* **b.** to increase the appeal of; to make more interesting, attractive, or exciting: *We've decided to sex up the movie with some battle scenes.* [1350–1400; ME < L *Sexus*, perh. akin to *secāre* to divide (see SECTION)]

American Heritage Dictionary 1605 (5th ed. 2011):

Sex (seks) *n.* **1a.** Sexual activity, especially sexual intercourse: *hasn't had sex in months.* **b.** The sexual urge or instinct as it manifests itself in behavior: *motivated by sex.* **2a.** Either of the two divisions, designated female and male, by which most organisms are classified on the basis of their reproductive organs and functions: *How do you determine the sex of a lobster?* **b.** The fact or condition of existing in these two divisions, especially the collection of characteristics that distinguish female and male: *the evolution of sex in plants; a study that takes sex into account.* See Usage Note at **gender.** **3.** Females or males considered as a group: *dormitories that house only one sex.* **4.** One's identity as either female or male. **5.** The genitals. ∴ *tr.v.* **sexed, sex-ing, sex-es** **1.** To determine the sex of (an organism). **2. Slang a.** To arouse sexually. Often used with *up.* **b.** To increase the

Appendix C to opinion of ALITO, J.

appeal or attractiveness of. Often used with *up* [Middle English < Latin *sexus*.]

C

Statutes Prohibiting Sex Discrimination

- 2 U. S. C. §658a(2) (Congressional Budget and Fiscal Operations; Federal Mandates)
- 2 U. S. C. §1311(a)(1) (Congressional Accountability; Extension of Rights and Protections)
- 2 U. S. C. §1503(2) (Unfunded Mandates Reform)
- 3 U. S. C. §411(a)(1) (Presidential Offices; Employment Discrimination)
- 5 U. S. C. §2301(b)(2) (Merit System Principles)
- 5 U. S. C. §2302(b)(1) (Prohibited Personnel Practices)
- 5 U. S. C. §7103(a)(4)(A) (Labor-Management Relations; Definitions)
- 5 U. S. C. §7116(b)(4) (Labor-Management Relations; Unfair Labor Practices)
- 5 U. S. C. §7201(b) (Antidiscrimination Policy; Minority Recruitment Program)

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- 5 U. S. C. §7204(b) (Antidiscrimination; Other Prohibitions)
- 6 U. S. C. §488f(b) (Secure Handling of Ammonium Nitrate; Protection From Civil Liability)
- 7 U. S. C. §2020(c)(1) (Supplemental Nutrition Assistance Program)
- 8 U. S. C. §1152(a)(1)(A) (Immigration; Numerical Limitations on Individual Foreign States)
- 8 U. S. C. §1187(c)(6) (Visa Waiver Program for Certain Visitors)
- 8 U. S. C. §1522(a)(5) (Authorization for Programs for Domestic Resettlement of and Assistance to Refugees)
- 10 U. S. C. §932(b)(4) (Uniform Code of Military Justice; Article 132 Retaliation)
- 10 U. S. C. §1034(j)(3) (Protected Communications; Prohibition of Retaliatory Personnel Actions)
- 12 U. S. C. §302 (Directors of Federal Reserve Banks; Number of Members; Classes)
- 12 U. S. C. §1735f–5(a) (Prohibition Against Discrimination on Account of Sex in Extension of Mortgage Assistance)

Appendix C to opinion of ALITO, J.

- 12 U. S. C. §1821(d)(13)(E)(iv) (Federal Deposit Insurance Corporation; Insurance Funds)
- 12 U. S. C. §1823(d)(3)(D)(iv) (Federal Deposit Insurance Corporation; Corporation Moneys)
- 12 U. S. C. §2277a–10c(b)(13)(E)(iv) (Farm Credit System Insurance Corporation; Corporation as Conservator or Receiver; Certain Other Powers)
- 12 U. S. C. §3015(a)(4) (National Consumer Cooperative Bank; Eligibility of Cooperatives)
- 12 U. S. C. §§3106a(1)(B) and (2)(B) (Foreign Bank Participation in Domestic Markets)
- 12 U. S. C. §4545(1) (Fair Housing)
- 12 U. S. C. §5390(a)(9)(E)(v) (Wall Street Reform and Consumer Protection; Powers and Duties of the Corporation)
- 15 U. S. C. §631(h) (Aid to Small Business)
- 15 U. S. C. §633(b)(1) (Small Business Administration)
- 15 U. S. C. §719 (Alaska Natural Gas Transportation; Civil Rights)
- 15 U. S. C. §775 (Federal Energy Administration; Sex Discrimination; Enforcement; Other Legal Remedies)

Appendix C to opinion of ALITO, J.

- 15 U. S. C. §1691(a)(1) (Equal Credit Opportunity Act)
- 15 U. S. C. §1691d(a) (Equal Credit Opportunity Act)
- 15 U. S. C. §3151(a) (Full Employment and Balanced Growth; Nondiscrimination)
- 18 U. S. C. §246 (Deprivation of Relief Benefits)
- 18 U. S. C. §3593(f) (Special Hearing To Determine Whether a Sentence of Death Is Justified)
- 20 U. S. C. §1011(a) (Higher Education Resources and Student Assistance; Antidiscrimination)
- 20 U. S. C. §1011f(h)(5)(D) (Disclosures of Foreign Gifts)
- 20 U. S. C. §1066c(d) (Historically Black College and University Capital Financing; Limitations on Federal Insurance Bonds Issued by Designated Bonding Authority)
- 20 U. S. C. §1071(a)(2) (Federal Family Education Loan Program)
- 20 U. S. C. §1078(c)(2)(F) (Federal Payments To Reduce Student Interest Costs)
- 20 U. S. C. §1087–1(e) (Federal Family Education Loan Program; Special Allowances)

Appendix C to opinion of ALITO, J.

- 20 U. S. C. §1087–2(e) (Student Loan Marketing Association)
- 20 U. S. C. §1087–4 (Discrimination in Secondary Markets Prohibited)
- 20 U. S. C. §1087tt(c) (Discretion of Student Financial Aid Administrators)
- 20 U. S. C. §1231e(b)(2) (Education Programs; Use of Funds Withheld)
- 20 U. S. C. §1681 (Title IX of the Education Amendments of 1972)
- 20 U. S. C. §1701(a)(1) (Equal Educational Opportunities; Congressional Declaration of Policy)
- 20 U. S. C. §1702(a)(1) (Equal Educational Opportunities; Congressional Findings)
- 20 U. S. C. §1703 (Denial of Equal Educational Opportunity Prohibited)
- 20 U. S. C. §1705 (Assignment on Neighborhood Basis Not a Denial of Equal Educational Opportunity)
- 20 U. S. C. §1715 (District Lines)
- 20 U. S. C. §1720 (Equal Educational Opportunities; Definitions)

Appendix C to opinion of ALITO, J.

- 20 U. S. C. §1756 (Remedies With Respect to School District Lines)
- 20 U. S. C. §2396 (Career and Technical Education; Federal Laws Guaranteeing Civil Rights)
- 20 U. S. C. §3401(2) (Department of Education; Congressional Findings)
- 20 U. S. C. §7231d(b)(2)(C) (Magnet Schools Assistance; Applications and Requirements)
- 20 U. S. C. §7914 (Strengthening and Improvement of Elementary and Secondary Schools; Civil Rights)
- 22 U. S. C. §262p–4n (Foreign Relations and Intercourse; Equal Employment Opportunities)
- 22 U. S. C. §2304(a)(1) (Human Rights and Security Assistance)
- 22 U. S. C. §2314(g) (Furnishing of Defense Articles or Related Training or Other Defense Service on Grant Basis)
- 22 U. S. C. §2426 (Discrimination Against United States Personnel)
- 22 U. S. C. §2504(a) (Peace Corps Volunteers)
- 22 U. S. C. §2661a (Foreign Contracts or Arrangements; Discrimination)

Appendix C to opinion of ALITO, J.

- 22 U. S. C. §2755 (Discrimination Prohibited if Based on Race, Religion, National Origin, or Sex)
- 22 U. S. C. §3901(b)(2) (Foreign Service; Congressional Findings and Objectives)
- 22 U. S. C. §3905(b)(1) (Foreign Service; Personnel Actions)
- 22 U. S. C. §4102(11)(A) (Foreign Service; Definitions)
- 22 U. S. C. §4115(b)(4) (Foreign Service; Unfair Labor Practices)
- 22 U. S. C. §6401(a)(3) (International Religious Freedom; Findings; Policy)
- 22 U. S. C. §8303(c)(2) (Office of Volunteers for Prosperity)
- 23 U. S. C. §140(a) (Federal-Aid Highways; Nondiscrimination)
- 23 U. S. C. §324 (Highways; Prohibition of Discrimination on the Basis of Sex)
- 25 U. S. C. §4223(d)(2) (Housing Assistance for Native Hawaiians)
- 26 U. S. C. §7471(a)(6)(A) (Tax Court; Employees)

Appendix C to opinion of ALITO, J.

- 28 U. S. C. §994(d) (Duties of the United States Sentencing Commission)
- 28 U. S. C. §1862 (Trial by Jury; Discrimination Prohibited)
- 28 U. S. C. §1867(e) (Trial by Jury; Challenging Compliance With Selection Procedures)
- 29 U. S. C. §206(d)(1) (Equal Pay Act of 1963)
- 29 U. S. C. §§2601(a)(6) and (b)(4) (Family and Medical Leave; Findings and Purposes)
- 29 U. S. C. §2651(a) (Family and Medical Leave; Effect on Other Laws)
- 29 U. S. C. §3248 (Workforce Development Opportunities; Nondiscrimination)
- 30 U. S. C. §1222(c) (Research Funds to Institutes)
- 31 U. S. C. §732(f) (Government Accountability Office; Personnel Management System)
- 31 U. S. C. §6711 (Federal Payments; Prohibited Discrimination)
- 31 U. S. C. §6720(a)(8) (Federal Payments; Definitions, Application, and Administration)

Appendix C to opinion of ALITO, J.

- 34 U. S. C. §10228(c) (Prohibition of Federal Control Over State and Local Criminal Justice Agencies; Prohibition of Discrimination)
- 34 U. S. C. §11133(a)(16) (Juvenile Justice and Delinquency Prevention; State Plans)
- 34 U. S. C. §12161(g) (Community Schools Youth Services and Supervision Grant Program)
- 34 U. S. C. §12361 (Violent Crime Control and Law Enforcement; Civil Rights for Women)
- 34 U. S. C. §20110(e) (Crime Victims Fund; Administration Provisions)
- 34 U. S. C. §50104(a) (Emergency Federal Law Enforcement Assistance)
- 36 U. S. C. §20204(b) (Air Force Sergeants Association; Membership)
- 36 U. S. C. §20205(c) (Air Force Sergeants Association; Governing Body)
- 36 U. S. C. §21003(a)(4) (American GI Forum of the United States; Purposes)
- 36 U. S. C. §21004(b) (American GI Forum of the United States; Membership)
- 36 U. S. C. §21005(c) (American GI Forum of the United States; Governing Body)

Appendix C to opinion of ALITO, J.

- 36 U. S. C. §21704A (The American Legion)
- 36 U. S. C. §22703(c) (Amvets; Membership)
- 36 U. S. C. §22704(d) (Amvets; Governing Body)
- 36 U. S. C. §60104(b) (82nd Airborne Division Association, Incorporated; Membership)
- 36 U. S. C. §60105(c) (82nd Airborne Division Association, Incorporated; Governing Body)
- 36 U. S. C. §70104(b) (Fleet Reserve Association; Membership)
- 36 U. S. C. §70105(c) (Fleet Reserve Association; Governing Body)
- 36 U. S. C. §140704(b) (Military Order of the World Wars; Membership)
- 36 U. S. C. §140705(c) (Military Order of the World Wars; Governing Body)
- 36 U. S. C. §154704(b) (Non Commissioned Officers Association of the United States of America, Incorporated; Membership)
- 36 U. S. C. §154705(c) (Non Commissioned Officers Association of the United States of America, Incorporated; Governing Body)
- 36 U. S. C. §190304(b) (Retired Enlisted Association, Incorporated; Membership)

Appendix C to opinion of ALITO, J.

- 36 U. S. C. §190305(c) (Retired Enlisted Association, Incorporated; Governing Body)
- 36 U. S. C. §220522(a)(8) and (9) (United States Olympic Committee; Eligibility Requirements)
- 36 U. S. C. §230504(b) (Vietnam Veterans of America, Inc.; Membership)
- 36 U. S. C. §230505(c) (Vietnam Veterans of America, Inc.; Governing Body)
- 40 U. S. C. §122(a) (Federal Property and Administrative Services; Prohibition on Sex Discrimination)
- 40 U. S. C. §14702 (Appalachian Regional Development; Nondiscrimination)
- 42 U. S. C. §213(f) (Military Benefits)
- 42 U. S. C. §290cc–33(a) (Projects for Assistance in Transition From Homelessness)
- 42 U. S. C. §290ff–1(e)(2)(C) (Children With Serious Emotional Disturbances; Requirements With Respect to Carrying Out Purpose of Grants)
- 42 U. S. C. §295m (Public Health Service; Prohibition Against Discrimination on Basis of Sex)

Appendix C to opinion of ALITO, J.

- 42 U. S. C. §296g (Public Health Service; Prohibition Against Discrimination by Schools on Basis of Sex)
- 42 U. S. C. §300w–7(a)(2) (Preventive Health and Health Services Block Grants; Nondiscrimination Provisions)
- 42 U. S. C. §300x–57(a)(2) (Block Grants Regarding Mental Health and Substance Abuse; Nondiscrimination)
- 42 U. S. C. §603(a)(5)(I)(iii) (Block Grants to States for Temporary Assistance for Needy Families)
- 42 U. S. C. §708(a)(2) (Maternal and Child Health Services Block Grant; Nondiscrimination Provisions)
- 42 U. S. C. §1975a(a) (Duties of Civil Rights Commission)
- 42 U. S. C. §2000c(b) (Civil Rights; Public Education; Definitions)
- 42 U. S. C. §2000c–6(a)(2) (Civil Rights; Public Education; Civil Actions by the Attorney General)
- 42 U. S. C. §2000e–2 (Equal Employment Opportunities; Unlawful Employment Practices)

Appendix C to opinion of ALITO, J.

- 42 U. S. C. §2000e–3(b) (Equal Employment Opportunities; Other Unlawful Employment Practices)
- 42 U. S. C. §2000e–16(a) (Employment by Federal Government)
- 42 U. S. C. §2000e–16a(b) (Government Employee Rights Act of 1991)
- 42 U. S. C. §2000e–16b(a)(1) (Discriminatory Practices Prohibited)
- 42 U. S. C. §2000h–2 (Intervention by Attorney General; Denial of Equal Protection on Account of Race, Color, Religion, Sex or National Origin)
- 42 U. S. C. §3123 (Discrimination on Basis of Sex Prohibited in Federally Assisted Programs)
- 42 U. S. C. §3604 (Fair Housing Act; Discrimination in the Sale or Rental of Housing and Other Prohibited Practices)
- 42 U. S. C. §3605 (Fair Housing Act; Discrimination in Residential Real Estate-Related Transactions)
- 42 U. S. C. §3606 (Fair Housing Act; Discrimination in the Provision of Brokerage Services)
- 42 U. S. C. §3631 (Fair Housing Act; Violations; Penalties)

Appendix C to opinion of ALITO, J.

- 42 U. S. C. §4701 (Intergovernmental Personnel Program; Congressional Findings and Declaration of Policy)
- 42 U. S. C. §5057(a)(1) (Domestic Volunteer Services; Nondiscrimination Provisions)
- 42 U. S. C. §5151(a) (Nondiscrimination in Disaster Assistance)
- 42 U. S. C. §5309(a) (Community Development; Nondiscrimination in Programs and Activities)
- 42 U. S. C. §5891 (Development of Energy Sources; Sex Discrimination Prohibited)
- 42 U. S. C. §6709 (Public Works Employment; Sex Discrimination; Prohibition; Enforcement)
- 42 U. S. C. §6727(a)(1) (Public Works Employment; Nondiscrimination)
- 42 U. S. C. §6870(a) (Weatherization Assistance for Low-Income Persons)
- 42 U. S. C. §8625(a) (Low-Income Home Energy Assistance; Nondiscrimination Provisions)
- 42 U. S. C. §9821 (Community Economic Development; Nondiscrimination Provisions)
- 42 U. S. C. §9849 (Head Start Programs; Nondiscrimination Provisions)

Appendix C to opinion of ALITO, J.

- 42 U. S. C. §9918(c)(1) (Community Services Block Grant Program; Limitations on Use of Funds)
- 42 U. S. C. §10406(c)(2)(B)(i) (Family Violence Prevention and Services; Formula Grants to States)
- 42 U. S. C. §11504(b) (Enterprise Zone Development; Waiver of Modification of Housing and Community Development Rules in Enterprise Zones)
- 42 U. S. C. §12635(a)(1) (National and Community Service State Grant Program; Nondiscrimination)
- 42 U. S. C. §12832 (Investment in Affordable Housing; Nondiscrimination)
- 43 U. S. C. §1747(10) (Loans to States and Political Subdivisions; Discrimination Prohibited)
- 43 U. S. C. §1863 (Outer Continental Shelf Resource Management; Unlawful Employment Practices; Regulations)
- 47 U. S. C. §151 (Federal Communications Commission)
- 47 U. S. C. §398(b)(1) (Public Broadcasting; Equal Opportunity Employment)

Appendix C to opinion of ALITO, J.

- 47 U. S. C. §§554(b) and (c) (Cable Communications; Equal Employment Opportunity)
- 47 U. S. C. §555a(c) (Cable Communications; Limitation of Franchising Authority Liability)
- 48 U. S. C. §1542(a) (Virgin Islands; Voting Franchise; Discrimination Prohibited)
- 48 U. S. C. §1708 (Discrimination Prohibited in Rights of Access to, and Benefits From, Conveyed Lands)
- 49 U. S. C. §306(b) (Duties of the Secretary of Transportation; Prohibited Discrimination)
- 49 U. S. C. §5332(b) (Public Transportation; Nondiscrimination)
- 49 U. S. C. §40127 (Air Commerce and Safety; Prohibitions on Discrimination)
- 49 U. S. C. §47123(a) (Airport Improvement; Nondiscrimination)
- 50 U. S. C. §3809(b)(3) (Selective Service System)
- 50 U. S. C. §4842(a)(1)(B) (Anti-Boycott Act of 2018)

APPLICATION FOR ENLISTMENT — ARMED FORCES OF THE UNITED STATES	<i>Form Approved</i> OMB 22-R 0331
DATA REQUIRED BY THE PRIVACY ACT OF 1974	
AUTHORITY: Title 10, United States Code, Sections 504, 505, 508, and 510, and Executive Order 9397.	
PRINCIPAL PURPOSE: To determine your eligibility for enlistment.	
ROUTINE USES: If you are enlisted, this form becomes the principal source document for, and a part of, your military personnel records which are used to make decisions related to your training, promotion, reassignment, and other personnel management actions.	
DISCLOSURE: Voluntary; failure to answer all questions on this form except 12, 26, 32, and 35 may result in denial of your enlistment.	
WARNING	
Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal law and regulation. The information provided by you becomes the property of the United States Government and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.	
IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS APPLICATION.	
YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH	
INSTRUCTIONS (Read carefully BEFORE filling out this form)	
1. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state. 2. Questions 12, 26, and 32 are optional and may be left blank. Question 35 may be answered orally. 3. If additional space is needed for any answer, continue it in Item 37, "REMARKS."	
SECTION I — PERSONAL DATA	
1. SOCIAL SECURITY ACCOUNT NUMBER	2. NAME (Last, First, Middle (& Maiden, if any), Jr., Sr., etc.)
3. CURRENT ADDRESS (Street, City, County, State, & ZIP Code)	4. HOME OF RECORD (City, County, State, & ZIP Code)
5. CITIZENSHIP <input type="checkbox"/> U.S. (BIRTH) <input type="checkbox"/> U.S. (DERIVED) <input type="checkbox"/> U.S. NATIONAL <input type="checkbox"/> NON-U.S. (Specify):	6. SEX <input type="checkbox"/> MALE <input type="checkbox"/> FEMALE
7. POPULATION GROUP <input type="checkbox"/> AM INDIAN <input type="checkbox"/> WHITE <input type="checkbox"/> BLACK <input type="checkbox"/> ASIAN <input type="checkbox"/> OTHER (Specify)	8. ETHNIC GROUP <input type="checkbox"/> U.S. (NATURALIZED) <input type="checkbox"/> U.S. (SPECIFY)
9. MARITAL STATUS	10. NO. OF DEPENDENTS
11. DATE OF BIRTH Y M D D D D	12. RELIGIOUS PREFERENCE
13. EDUC (Highest grade completed)	14. SELECTIVE SERVICE INFORMATION NUMBER CLASS <input type="checkbox"/> NOT REGISTERED <input type="checkbox"/> SPEAK <input type="checkbox"/> WRITE <input type="checkbox"/> READ
15. FOREIGN LANGUAGE AND SKILL	16. DRIVER'S LICENSE INFORMATION STATE NUMBER EXPIRES

Appendix D to opinion of ALITO, J.

SECTION II - EXAMINATION AND ENLISTMENT DATA PROCESSING CODES
 -- FOR OFFICE USE ONLY --

DO NOT WRITE IN THIS SECTION
 (Go on to Item 2)

17. TEST ID		18. MEDICAL RESULTS		19. DELAYED ENLISTMENT DATA		20. ACCESSION DATA		21. SVC REQUIRED DATA CODES																																																																	
A. TEST ID	B. AFQT SILE	C. MENTAL TEST RESULTS				D. ACTIVE DUTY SVC DATE				E. PAY GRADE				F. DATE OF GRADE				G. HIGHEST GRADE																																																							
		ARTITUDE MAN SCORES				TOE				MOS/AFS				YOUTH				TRANSFER TO																																																							
		G. I	H. N	J. O	K. A	L. D	M. W	N. E	O. S	P. I	Q. M	R. C	S. G	T. S	U. I	V. A	W. J	X. C	Y. M	Z. C	AA. A	AB. C	AC. E	AD. C																																																	
		B. HT, C. WEIGHT				D. BLOOD PRESSURE				E. HAIR COLOR				F. EYE COLOR				G. VISUAL ACUTY				H. COLOR VISION																																																			
		SYSTOLIC				DIASTOLIC				UNDIRECTED				CORRECTED				RT 20'				LF 20'																																																			
		G. DATE OF ENLISTMENT				H. PROACTIVE DUTY DATE				I. RECRUITER IDENTIFICATION				J. PROG ENL FOR				K. THE MOS/AFS																																																							
		Y. Y. M. M. D. D.				Y. Y. M. M. D. D.				Y. Y. M. M. D. D.				Y. Y. M. M. D. D.				Y. Y. M. M. D. D.				Y. Y. M. M. D. D.																																																			
		L. RECRUITER IDENTIFICATION				M. PROG ENL FOR				N. THE MOS/AFS				O. L. O. A.				P. A. TRANSFER TO																																																							
		1				2				3				4				5				6				7				8				9				10				11				12				13				14				15				16											
		17				18				19				20				21				22				23				24				25				26				27				28				29				30				31				32				33				34			
		35				36				37				38				39				40				41				42				43				44				45				46				47				48				49				50				51				52			
		53				54				55				56				57				58				59				60				61				62				63				64				65				66				67				68				69				70			

DD FORM 1966/1
 1 SEP 78

DD FORMS 1966/1 THRU 8, 1 SEP 78, REPLACE THE PREVIOUS EDITION OF THIS SERIES (1 AUG 75), WHICH IS OBSOLETE.

PAGE 1

LAST NAME: _____ SSN: _____

III. VERIFICATION OF PERSONAL DATA

23. If Preferred Enlistment Name (name given in block 1) is not the same as on your birth certificate and has not been changed by legal procedure prescribed by state law, complete the following:

a. NAME AS SHOWN ON BIRTH CERTIFICATE _____

I hereby state that I have not changed my name through any court procedure; and that I prefer to use the name by which I am known in the community as a matter of convenience and with no criminal or fraudulent intent. I further state that I am the same person as the one whose name is shown in block 1.

b. WITNESS (Name, grade, and signature) _____

c. SIGNATURE OF APPLICANT _____

24. EDUCATION

YEAR & MONTH FROM	TO	NAME AND LOCATION OF SCHOOL	GRADUATE		DEGREE RECEIVED
			YES	NO	

25. CITIZENSHIP VERIFICATION (To be completed in presence of your recruiter).

a. PLACE OF BIRTH (City, State and (if not in USA) Country) _____

b. BIRTH CERTIFICATE ISSUED BY (County and State) _____

c. BIRTH CERTIFICATE FILE NUMBER _____

d. IF NATURALIZED, CERTIFICATE NO. _____

e. IF DERIVED, PARENTS' CERTIFICATE NOSI, DATE, PLACE AND COURT _____

f. IF ALIEN, ALIEN REGISTRATION NUMBER _____

g. NATIVE COUNTRY _____

h. DATE AND PORT OF ENTRY _____

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26. MILITARY SERVICE									
a. Are you now or have ever been in the Regular, Reserve or National Guard of the United States? <input type="checkbox"/> No <input type="checkbox"/> Yes. If "yes", complete the following:									
b. PAY GRADE AND SERVICE NUMBER	c. SERVICE AND COMPONENT	d. DATE OF ENTRY	e. DATE OF DISCH	f. TYPE DISCH/REL	g. TIME LOST (NO. OF DAYS)				
h. If you are now a member of a US Reserve or National Guard organization, fill in organization name and unit address:									
27a. PREVIOUS MILITARY SERVICE									
<i>DO NOT WRITE IN THIS BLOCK</i>									
		Total Active Military Service		Years		Months		Days	
		Total Inactive Military Service							
IV. OTHER BACKGROUND DATA									
28a. RELATIVES		b. DATE AND PLACE OF BIRTH			c. PRESENT ADDRESS			d. CITIZENSHIP	
FATHER									
MOTHER (Maiden-name)									
SPOUSE (Maiden-name)									
CHILDREN (Show Relationship)									
MARRIAGE NUMBER									

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LAST NAME:		SSN:	
29. COMMERCIAL LIFE INSURANCE POLICIES YOU OWN ON YOUR LIFE—Optional entry; used to assist your survivors in filing claims should you die while on active duty.			
a. NAME OF COMPANY ISSUING POLICY		b. POLICY NUMBER	
30. RELATIVES AND ALIEN FRIENDS LIVING IN FOREIGN COUNTRIES—List anyone with whom you had or have a close relationship, who lives in a foreign country.			
a. NAME AND RELATIONSHIP	b. AGE	c. OCCUPATION	d. ADDRESS
			e. CITIZENSHIP
31. RESIDENCES—List all from 10th birthday.			
YEAR & MONTH	NUMBER AND STREET	CITY	STATE ZIP CODE
FROM			
TO			
32. EMPLOYMENT—Show every employment you have had and all periods of unemployment.			
a. YEAR & MONTH	b. Company name and address (Street, City, State, and Zip Code)	c. JOB TITLE	d. SUPERVISOR NAME
FROM			
TO			
e. HAVE YOU EVER WORKED FOR A FOREIGN GOVERNMENT? <input type="checkbox"/> NO <input type="checkbox"/> YES (If "yes" give dates of employment, Government you worked for, location and nature of your duties)			

Appendix D to opinion of ALITO, J.

33. MEMBERSHIP IN YOUTH PROGRAMS—Optional entry; you may be eligible for a higher paygrade, based on membership and participation in the youth programs listed below.

No membership

ORGANIZATION	MEMBERSHIP HELD		CONDUCTED BY (SPONSOR)	LOCATION (SCHOOL AND ADDRESS)	YEARS COMPLETED OR LEVEL REACHED (YEARS)
	FROM	TO			
ROTC					
JROTC					
CAP			AIR FORCE		
SEA CADET			NAVY		
OTHER (Specify)					

34. FOREIGN TRAVEL—Other than as a direct result of military service.

YEAR & MONTH FROM	YEAR & MONTH TO	COUNTRY VISITED	PURPOSE OF TRAVEL

35. DECLARATIONS—Explain "Yes" answers in item 41.

a. HAVE YOU EVER BEEN REJECTED FOR ENLISTMENT, REENLISTMENT, OR INDUCTION INTO ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? NO YES

b. ARE YOU A CONSCIENTIOUS OBJECTOR? NO YES

c. ARE YOU NOW OR HAVE YOU EVER BEEN A DESERTER FROM ANY BRANCH OF THE ARMED FORCES OF THE UNITED STATES? NO YES

d. ARE YOU NOW DRAWING, OR DO YOU HAVE AN APPLICATION PENDING OR APPROVAL FOR, RETIRED PAY, DISABILITY ALLOWANCE, OR SEVERANCE PAY OR A PENSION FROM THE GOVERNMENT OF THE UNITED STATES? NO YES

e. ARE YOU THE ONLY LIVING CHILD OF YOUR PARENTS? NO YES

36. UNDERSTANDINGS.

a. I understand that if I am rejected for enlistment because of a disqualification I have concealed, I may not be provided return transportation from the place of examination to my home.

b. (For male applicants only). I understand that if I have not reached my 26th birthday that an original enlistment obligates me to serve in the Armed Forces for a period of six (6) years (active and reserve) unless sooner discharged.

INITIALS: _____

LAST NAME: _____ SSN: _____

37. CHARACTER AND SOCIAL ADJUSTMENT: Read and consider the following instructions carefully **BEFORE** answering questions a through f.

- If your answer to every question is truthfully "NO", please indicate in the appropriate space.
- If your answer to any questions in this item is "YES", or you have reservations about answering questions of this nature, you are not required to answer, or explain any of these questions in writing. Instead, you may request a personal interview in which you may provide the required information for each question orally.
- If you choose the personal interview, the information you give may be investigated; however, any written record of the interview itself will not be retained more than six months after entry upon active duty, and it will not become a part of your permanent military personnel service record.
- If you enlist, this information may be requested from you again at some future date and may become a part of your security investigative file at that time. This could occur as a result of your being considered for duties involving access to classified information or other types of duty requiring a personnel security investigation.
- A "YES" answer will not necessarily disqualify you for enlistment. It will depend on the circumstances surrounding the situation involved.

INITIAL HERE IF YOU PREFER A PERSONAL INTERVIEW: _____

APPLICANT HAS BEEN INTERVIEWED AND IS ELIGIBLE FOR ENLISTMENT, INELIGIBLE FOR ENLISTMENT

DATE OF INTERVIEW	NAME, ORGANIZATION & TITLE	SIGNATURE OF INTERVIEWER	NO	YES
EXPLAIN "YES" ANSWERS IN ITEM 41:				
a. HAVE YOU EVER TAKEN ANY NARCOTIC SUBSTANCE, SEDATIVE, STIMULANT, OR TRANQUILIZER DRUGS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?				
b. HAVE YOU EVER INTENTIONALLY SNIFFED GLUE, PAINT, HAIRSPRAY, OR OTHER CHEMICAL FUMES?				
c. HAVE YOU EVER BEEN INVOLVED IN THE USE, PURCHASE, POSSESSION OR SALE OF MARIJUANA, LSD, OR ANY HARMFUL OR HABIT-FORMING DRUGS AND/OR CHEMICALS EXCEPT AS PRESCRIBED BY A LICENSED PHYSICIAN?				
d. HAS YOUR USE OF ALCOHOLIC BEVERAGES (SUCH AS LIQUOR, BEER, WINE) EVER RESULTED IN THE LOSS OF A JOB, ARREST BY POLICE, OR TREATMENT FOR ALCOHOLISM?				
e. HAVE YOU EVER BEEN A PATIENT (WHETHER OR NOT FORMALLY COMMITTED) IN ANY INSTITUTION PRIMARILY DEVOTED TO THE TREATMENT OF MENTAL, NERVOUS, EMOTIONAL, PSYCHOLOGICAL OR PERSONALITY DISORDERS?				
f. HAVE YOU EVER ENGAGED IN HOMOSEXUAL ACTIVITY (SEXUAL RELATIONS WITH ANOTHER PERSON OF THE SAME SEX)?				

Appendix D to opinion of ALITO, J.

	NO	YES
38. MARITAL STATUS AND DEPENDENCY		
a. ARE YOU NOW, OR HAVE YOU EVER BEEN MARRIED?		
b. IF YOU HAVE BEEN MARRIED, ARE YOU NOW LIVING WITH YOUR SPOUSE?		
c. HAVE YOU EVER BEEN DIVORCED? (If yes, enter date, place and court which granted divorce or legal separation)		
d. IS ANY COURT ORDER OR JUDGEMENT DIRECTING SUPPORT FOR CHILDREN OF ALIMONY IN EFFECT? (Enter date, place, and court which granted alimony decree, or support as the result of a paternity suit)		
e. IS ANYONE OTHER THAN YOUR SPOUSE AND/OR CHILDREN SOLELY OR PARTIALLY DEPENDENT UPON YOU? (list name & address)		
39. Do you now have, or within the past ten years, have you had knowing membership with the specific intent of furthering the aims of, or adherence to and active participation in any foreign or domestic organizations, association, movement, group, or combination of persons (hereinafter referred to as organizations) which unlawfully advocates or practices the commission of acts of force or violence to prevent others from exercising their rights under the Constitution or laws of the United States or of any State, or which seeks to overthrow the Government of the United States or any State or subdivision thereof by unlawful means?		
If you answered "yes", give the names of the organizations and inclusive dates (month and year) of your membership; describe the nature of your activities as a member of the organization(s) in the "Remarks" section, item 41.	NO	YES
40. INVOLVEMENT WITH POLICE OR JUDICIAL AUTHORITIES		
YOUR ANSWERS TO THE FOLLOWING QUESTIONS WILL BE VERIFIED WITH THE FEDERAL BUREAU OF INVESTIGATION (FBI), AND OTHER AGENCIES TO DETERMINE ANY PREVIOUS RECORDS OF ARREST OR CONVICTIONS OR JUVENILE COURT ADJUDICATIONS. IF YOU CONCEAL SUCH RECORDS AT THIS TIME, YOU MAY, UPON ENLISTMENT, BE SUBJECT TO DISCIPLINARY ACTION UNDER THE UNIFORM CODE OF MILITARY JUSTICE AND/OR DISCHARGE FROM THE MILITARY SERVICE WITH OTHER THAN AN HONORABLE DISCHARGE.		
a. Have you ever been arrested, charged, cited, or held by Federal, State, or other law enforcement or juvenile authorities regardless of whether the citation or charge was dropped or dismissed or you were found not guilty?	NO	YES
b. As a result of being arrested, charged, cited, or held by law enforcement or juvenile authorities; have you ever been convicted, fined by or forfeited bond to a Federal, State, or other judicial authority or adjudicated a youthful offender or juvenile delinquent regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record?		
c. Have you ever been detained, held in, or served time in, any jail or prison, or reform or industrial school or any juvenile facility or institution under the jurisdiction of any City, County, State, Federal or foreign country?		
d. Have you ever been awarded, or are you now under suspended sentence, parole, or probation or awaiting any action on charges against you?		

Appendix D to opinion of ALITO, J.

I am interested in the following options or programs:

V. CERTIFICATION

42. BY APPLICANT: I UNDERSTAND THAT THE ARMED FORCES REPRESENTATIVE WHO WILL ACCEPT MY ENLISTMENT DOES SO IN RELIANCE ON THE INFORMATION PROVIDED BY ME IN THIS DOCUMENT; THAT IF ANY OF THE INFORMATION IS KNOWINGLY FALSE OR INCORRECT, I MAY BE PROSECUTED UNDER FEDERAL CIVILIAN OR MILITARY LAW OR SUBJECT TO ADMINISTRATIVE SEPARATION PROCEEDINGS AND, IN EITHER INSTANCE, I MAY RECEIVE A LESS THAN HONORABLE DISCHARGE WHICH COULD AFFECT MY FUTURE EMPLOYMENT OPPORTUNITIES. I CERTIFY THAT THE INFORMATION GIVEN BY ME IN THIS DOCUMENT IS TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

a. NAME	b. NAME (of TV, radio, or other)	c. SIGNATURE OF APPLICANT
---------	----------------------------------	---------------------------

43. DATA VERIFICATION: To be completed by the recruiter who enters a description of the actual documents reviewed by him/her to verify:

NAME	AGE	CITIZENSHIP
EDUCATION	PRIOR MILITARY SERVICE	
OTHER (Specify)		

DD FORM 1966/5 REPLACES DD FORM 1965, 1 JUN 75, WHICH WILL BE USED
1 AUG 75

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SPECIFIC OPTIONS ENLISTED FOR	
<p>I certify that I have reviewed all information contained in this document and, to the best of my judgment and belief, applicant fulfills all legal and policy requirements for enlistment. I accept his/her enlistment on behalf of the _____ I further certify that service regulations governing such enlistment have been strictly complied with, and any waivers required to effect applicant's enlistment have been secured and are attached to this document.</p>	
DATE	NAME, GRADE, AND SSN, ORGANIZATION OR RECRUITER ID <small>(Type or Print)</small>
VIII. RECERTIFICATION BY APPLICANT, AND CORRECTION OF DATA AT TIME OF ENLISTMENT I HAVE REVIEWED ALL INFORMATION CONTAINED IN THIS DOCUMENT; THAT INFORMATION IS STILL CORRECT AND TRUE TO THE BEST OF MY KNOWLEDGE AND BELIEF. IF CHANGES WERE REQUIRED, THE ORIGINAL ENTRY HAS BEEN MARKED. "SEE VIII." AND THE CORRECTED INFORMATION IS PROVIDED BELOW, KEYED TO THE APPROPRIATE QUESTION.	
QUESTION	CHANGE REQUIRED
DATE	NAME, GRADE, SSN AND SIGNATURE OF WITNESS <small>(Type or Print)</small>
	SIGNATURE OF APPLICANT

Appendix D to opinion of ALITO, J.

RECORD OF MILITARY PROCESSING - ARMED FORCES OF THE UNITED STATES		Form Approved OMB No 0704-0173 Exp Date: Jun 30 1988
Before completing this form read carefully all State and Federal Instructions on Reverse		
A. SERVICE PROCESSING FOR	B. STATUS UNDER	C. SELECTIVE SERVICE CLASSIFICATION
	1. APTS	D. SELECTIVE SERVICE REGISTRATION NO.
SECTION I - PERSONAL DATA		
1. SOCIAL SECURITY NUMBER	2. NAME (Last, First, Middle Name (if known), Army, Air, or Navy)	3. ALIASES
4. CURRENT ADDRESS (Home, Club, Country, Home, or Camp)	5. HOME OF RECORD ADDRESS (Home, Club, Country, Home, or Camp)	
6. CITIZENSHIP (If none)	7. SEX	8. POPULATION GROUP
a. U.S. AT BIRTH (If any, list as number, e.g., 101 or 102)	a. MALE	a. WHITE
b. NATIVE BORN	b. FEMALE	b. BLACK
c. BORN ABROAD OF U.S. PARENTS	9. ETHNIC GROUP (Specify)	c. ASIAN
d. U.S. NATURALIZED	10. MARITAL STATUS (Specify)	d. AMERICAN INDIAN
e. U.S. DERIVED THROUGH NATURALIZATION OF PARENTS		e. OTHER (Specify)
f. U.S. NON-CITIZEN NATIONAL		
g. IMMIGRANT ALIEN (Specify)		
h. NON-IMMIGRANT FOREIGN NATIONAL (Specify)		
11. DATE OF BIRTH (Month/Day/Year)	14. EDUCATION (Program, Grade, Certificate)	15. NUMBER OF DEPENDENTS
12. DATE OF BIRTH (Month/Day/Year)	13. RELIGIOUS PREFERENCE (Specify)	16. PROFICIENT IN FOREIGN LANGUAGE (Specify)
15. VALID DRIVER'S LICENSE (Type of No. State, and Expiration Date)	17. PLACE OF BIRTH (City, State and Country)	

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SECTION II - EXAMINATION AND ENTRANCE DATA PROCESSING CODES
FOR OFFICE USE ONLY - DO NOT WRITE IN THIS SECTION - GO ON TO PART 2, QUESTION 23

18. APTITUDE TEST RESULTS														
a. TEST ID TO TEST SCORES														
GS	AR	WV	PC	DD	CS	AS	MC	MC	EL	VE				
c. APTITUDE PERCENTILE														
GI	AD	AW	AR	AP	AK	EL	MC	GS	SI	AT				
19. DEP ENLISTMENT DATA														
a. DATE OF DEP ENLISTMENT (mm/dd/yyyy)		b. RECRUITER IDENTIFICATION		c. PROGRAM ENLISTED FOR		d. ANNUALS								
20. ACQUISITION DATA														
a. DATE OF DEP ENLISTMENT (mm/dd/yyyy)		b. ACTIVE DUTY STATUS		c. PAY GRADE		d. DATE OF GRADE PROMOTION		e. PAY GRADE		f. DATE OF GRADE PROMOTION		g. HIGHEST ED-GA COMPL		
21. RECRUITER IDENTIFICATION														
a. PROGRAM ENLISTED FOR		b. PROGRAM ENLISTED FOR		c. PROGRAM ENLISTED FOR		d. PROGRAM ENLISTED FOR		e. PROGRAM ENLISTED FOR		f. PROGRAM ENLISTED FOR		g. PROGRAM ENLISTED FOR		
22. SERVICE REQUIRED CODES														
1	2	3	4	5	6	7	8	9	10	11	12	13	14	
15	16	17	18	19	20	21	22	23	24	25	26	27	28	
29	30	31	32	33	34	35	36	37	38	39	40	41	42	
43	44	45	46	47	48	49	50	51	52	53	54	55	56	
57	58	59	60	61	62	63	64	65	66	67	68	69	70	

<p>DD Form 1966</p> <p>RECORD OF MILITARY PROCESSING</p> <p>ARMED FORCES OF THE UNITED STATES</p>	
<p><u>Privacy Act Statement</u></p>	
<p>AUTHORITY:</p>	<p>Title 10, United States Code, Sections 504, 505, 508, 510, and 520a, and Title 50 USC Appendix 451 and following section.</p>
<p>PRINCIPAL PURPOSE:</p>	<p>To determine your eligibility for military service.</p>
<p>ROUTINE USES:</p>	<p>This form becomes the principal source document for, and part of, your military personnel records which are used to make decisions related to your training, promotion, assignments, and other personnel management actions.</p>
<p>DISCLOSURE: (Applicants)</p>	<p>Voluntary; however, failure to answer all questions on this form, except "optional" items, may result in denial of your enlistment.</p>
<p>(Selective Service Registrants)</p>	<p>Disclosure of requested information is mandatory except "optional" items, disclosure of which is voluntary.</p>
<p>WARNING</p>	
<p>Information provided by you on this form is FOR OFFICIAL USE ONLY and will be maintained and used in strict compliance with Federal laws and regulations. The information provided by you becomes the property of the United States Government, and it may be consulted throughout your military service career, particularly whenever either favorable or adverse administrative or disciplinary actions related to you are involved.</p>	

Appendix D to opinion of ALITO, J.

YOU CAN BE PUNISHED BY FINE, IMPRISONMENT OR BOTH IF YOU ARE FOUND GUILTY OF MAKING A KNOWING AND WILLFUL FALSE STATEMENT ON THIS DOCUMENT.

INSTRUCTIONS
(Read carefully BEFORE filling out this form.)

1. Read Privacy Act Statement above before completing form.
2. Type or print LEGIBLY all answers; if the answer is "None" or "Not Applicable," so state. "OPTIONAL" questions may be left blank.
3. List all responses requiring dates (schools, employment/residences) in chronological order beginning with present or the most recent and work backwards. Show all (employers/residences) for the last five years or since 13th birthday. Give inclusive dates for each period of residence/employment/school. If additional space is needed for any answer, continue it in item 39, "Remarks."
4. Unless otherwise specified, write all dates as 6 digits (with no spaces or marks) in YYMMDD fashion. February 13, 1985 is written 850213.

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26. EMPLOYMENT (Show all periods of employment and unemployment during the last five years.)

a. FROM (Year)	b. TO (Year)	c. NAME OF EMPLOYER	d. ADDRESS (Street, City, State)	e. NAME OF IMMEDIATE SUPERVISOR	f. JOB TITLE
		PRESENT			

27. RELATIVES

a. NAME (Last, First, Middle Initial)	b. DEPN YES/NO	c. DATE OF BIRTH (mm/dd/yyyy)	d. PLACE OF BIRTH	e. PRESENT ADDRESS	f. CITIZENSHIP
FATHER					
MOTHER (Indicate maiden name)					
SPOUSE (Indicate Name, if identifiable)					
CHILDREN					

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Previous editions are obsolete.

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NAME		SOCIAL SECURITY NUMBER	
		YES	NO
28. Are you now or have you ever been in any regular or reserve branch of the Armed Forces or in the Army National Guard or the Air National Guard? (Give your recruiter the appropriate DD Form 214 and/or DD Form 215 or MGB Form 22 for review.)			
29. Are you now or have you ever been divorced or legally separated? If "YES," enter in item 39, "REMARKS," the date, place and court which granted divorce or legal separation.			
30. Is any court order or judgment in effect that directs you to provide support for children or alimony? If "YES," enter in item 39, "REMARKS," the date, place, and court which granted alimony or support, including orders resulting from paternity suits.			
31. Have you ever been arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, regardless of whether the citation was dropped or dismissed or you were found not guilty? Include all courts-martial or non-judicial punishment while in military service. If "YES," enter details in item 35.			
32. As a result of being arrested, apprehended, charged, cited or held by Federal, State, military or other law enforcement or juvenile authorities, have you ever been convicted, fined by or forfeited bond to a Federal, State or other judicial authority or adjudicated a youthful offender or juvenile delinquent (regardless of whether the record in your case has been "sealed" or otherwise stricken from the court record); or have you been released from parole, probation, juvenile supervision or given a suspended sentence or relieved of charges pending on condition that you apply for or enlist in the United States Armed Forces? If "YES," enter details in item 35.			
33. Have you ever been detained, held in, or served time in any jail or prison, reform or industrial school, or a juvenile facility or institution under the jurisdiction of any city, state, Federal or foreign country? If "YES," enter details in item 35.			
34. Have you ever been a ward, or are you now under suspended sentence, parole, or probation or awaiting any action on criminal/civil charges against you? If "YES," enter details in item 35.			
35. LAW VIOLATIONS. Explain below "YES" answers given in items 31 through 34 above (include all incidents with law enforcement authorities even if the citation or charge was dropped or dismissed or you were found not guilty or you have been told by recruiting personnel or anyone else that the incident was not important enough to list.)			
A. DATE (YYMMDD)	B. NATURE OF OFFENSE OR VIOLATION	C. PLACE OF OFFENSE	D. NAME AND LOCATION OF COURT
			E. PENALTY IMPOSED OR OTHER DISPOSITION IN EACH CASE

Appendix D to opinion of ALITO, J.

		YES	NO
<p>36. CHARACTER AND SOCIAL ADJUSTMENT: If your answer to every question is truthfully "NO," indicate so in the appropriate space if your answer is "YES," indicate so in the appropriate space and give details in Item 39, "REMARKS." A "YES" answer will not necessarily disqualify you for enlistment; it will depend on the circumstances surrounding the situation.</p>			
a	<p>Questions (1), (2), and (3) below concern possession, supply, use without a prescription of marijuana, narcotics, LSD or other dangerous drugs. A "Yes" answer to (3) has no bearing on your eligibility to enlist or be commissioned but is essential to accurate job classification. Additional screening will occur during basic training or officer training school.</p> <p>(1) Have you ever used narcotics, LSD or other dangerous drugs?</p> <p>(2) Have you ever been a supplier of narcotics, LSD or other dangerous drugs or marijuana?</p> <p>(3) Have you used marijuana at any time in the past six months?</p> <p>Has your use of drugs or alcoholic beverages (such as liquor, beer, wine), ever resulted in your loss of a job, arrest by police, or treatment of alcoholism?</p>		
	<p>Are you a homosexual or a bisexual? ("Homosexual" is defined as: sexual desire or behavior directed at a person(s) of one's own sex. "Bisexual" is defined as: a person sexually responsive to both sexes.)</p>		
	<p>Do you intend to engage in homosexual acts (sexual relations with another person of the same sex)?</p>		
e	<p>Are you a conscientious objector? That is, do you have, or have you ever had, a firm, fixed, and sincere objection to participation in war in any form or to the bearing of arms because of religious training or belief?</p>		
f	<p>Have you ever been rejected for enlistment, reenlistment, or induction by any branch of the Armed Forces of the United States?</p>		
g	<p>Are you now, or have you ever been, a deserter from any branch of the Armed Forces of the United States?</p>		
h	<p>Are you now, or have you ever been, a member of the Communist Party or any Communist organization? Are you now, or have you ever been, affiliated with any organization, movement, group or combination of persons which advocates the overthrow of our constitutional form of government or which has adopted the policy of advocating the commission of acts of violence to deny other persons their rights under the Constitution of the United States or which seeks to alter the form of government of the United States by unconstitutional means? (If "YES," give details in Item 39, "REMARKS.")</p>		

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Previous editions are obsolete

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NAME		MILITARY SERVICE NUMBER	
SECTION 1 - CERTIFICATION			
<p>1. I CERTIFY THAT THE INFORMATION GIVEN BY ME IN THIS DOCUMENT IS TRUE, COMPLETE, AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF. I UNDERSTAND THAT I AM BEING ACCEPTED FOR ENLISTMENT BASED ON THE INFORMATION PROVIDED BY ME IN THIS DOCUMENT. THAT IF ANY OF THE INFORMATION IS KNOWINGLY FALSE OR INCORRECT, I COULD BE TRIED IN A CIVILIAN OR MILITARY COURT AND COULD RECEIVE A LESS THAN HONORABLE DISCHARGE WHICH COULD AFFECT MY FUTURE EMPLOYMENT OPPORTUNITIES.</p>			
2. I HAVE BEEN ADVISED THAT THIS FORM WILL BE		A. DATE SIGNED BY APPLICANT	
<p>41. DATE VERIFICATION BY RECRUITER (PLEASE PRINT) IS VALID FOR THE INITIAL ENLISTMENT AND IS VALID FOR ANY SUBSEQUENT REENTRY.</p>			
3. NAME IS (Last, First, Middle)		4. SERVICE NUMBER	
5. DATE OF BIRTH (MM/DD/YYYY)		6. GRADE (E-1 to E-9)	
7. SOCIAL SECURITY NUMBER (MM/DD/YYYY)		8. GRADE (E-1 to E-9)	
9. STATE OF RESIDENCE		10. GRADE (E-1 to E-9)	
<p>42. CERTIFICATION OF WITNESS</p> <p>I, _____, certify that I have witnessed the applicant's signature above and that I have verified the data in the documents required as prescribed by my directives. I further certify that I have not made any promises or guarantees other than those listed and signed by me. I understand my liability to trial by court-martial under the Uniform Code of Military Justice should I attempt or cause to be effected the enlistment of anyone known by me to be ineligible for enlistment.</p>			
11. NAME OF WITNESS (Last, First, Middle)		12. GRADE (E-1 to E-9)	
13. SIGNATURE OF WITNESS		14. DATE SIGNED BY WITNESS	
<p>43. SPECIFIC OPTION PROGRAM (LIMITED TO MILITARY SKILL OR ASSIGNMENT TO A BIOLOGICAL AREA GUARANTEE)</p> <p>44. SPECIFIC OPTION PROGRAM (LIMITED TO MILITARY SKILL OR ASSIGNMENT TO A BIOLOGICAL AREA GUARANTEE)</p>			

Appendix D to opinion of ALITO, J.

I fully understand that I will not be guaranteed any specific military skill or assignment to a geographic area except as shown in item 43a above and annexes attached to my Enlistment/Reenlistment Document (DD Form 4)		APPLICANT'S INITIAL
44. CERTIFICATION OF RECEIPT OF ACCEPTANCE		
I certify that I have reviewed all information contained in this document and, to the best of my judgment and belief, the applicant fulfills all legal policy requirements for enlistment. I accept: <input type="checkbox"/> Member for enlistment on behalf of the United States (initials of member) _____ and certify that I have not made any promises or guarantees other than those listed in item 43 above. I further certify that service regulations governing such enlistments have been strictly complied with and any waivers required to effect applicant's enlistment have been secured and are attached to this document.		
<input type="checkbox"/> YES, I HAVE READ AND UNDERSTAND THIS DOCUMENT	<input type="checkbox"/> I BELIEVE THE INFORMATION IS CORRECT	DATE: _____ SIGNATURE: _____
SECTION V3 - RECERTIFICATION		
45. RECERTIFICATION BY APPLICANT AND CORRECTION OF DATA AT THE TIME OF ACTIVE DUTY ENTRY		
I have reviewed all information contained in this document this date. That information is still correct and true to the best of my knowledge and belief. If changes were required, the original entry has been marked "See item 45" and the correct information is provided below.		
<input type="checkbox"/> YES, I HAVE READ AND UNDERSTAND THIS DOCUMENT	<input type="checkbox"/> I BELIEVE THE INFORMATION IS CORRECT	DATE: _____ SIGNATURE: _____
46. NOTES		
THE FIELD OF NOTES HERE		
DATE: _____ SIGNATURE: _____		
DD FORM 1306VS, AUG 05		

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STANDARD FORM 475 0300015

NAME _____	SOCIAL SECURITY NUMBER _____	
NOTE USE THIS DD FORM 1466 PAGE ONLY IF EITHER SECTION APPLIES TO THE APPLICANT'S RECORD OF MILITARY PROCESSING		
SECTION VII - PARENTAL / GUARDIAN CONSENT FOR ENLISTMENT		
26. PARENT / GUARDIAN STATEMENT(S) (LINE OUR OPTIONS NOT APPLICABLE)		
a. I/we certify that (Enter name of applicant) _____ has no other legal guardian other than me/us and I/we consent to his/her enlistment in the United States (Enter Branch of Service) _____ I/we certify that no promises or any kind have been made to me/us concerning assignment to duty, training, or promotion during his/her enlistment as an inducement to me/us to sign this consent. I/we hereby authorize the Armed Forces representatives concerned to perform medical examinations, other examinations required, and to conduct records checks to determine his/her eligibility. I/we relinquish all claim to his/her service and to any wage or compensation for such service.	b. <u>FOR ENLISTMENT IN A RESERVE COMPONENT</u> I/we understand that, as a member of a reserve component, he/she must serve minimum periods of active duty for training unless excused by competent authority. In the event he/she fails to fulfill the obligations of his/her reserve enlistment, he/she may be recalled to active duty as prescribed by law. I/we further understand that while he/she is in the ready reserve, he/she may be ordered to extended active duty in time of war or national emergency declared by the Congress or the President or when otherwise authorized by law.	(U) DATE SIGNED (Provide) _____
c. PARENT (I) TYPE OR PRINTED NAME (Last, First, Middle Initial) _____	(U) SIGNATURE _____	(U) DATE SIGNED (Provide) _____
e. WITNESS (I) TYPE OR PRINTED NAME (Last, First, Middle Initial) _____	(U) SIGNATURE _____	(U) DATE SIGNED (Provide) _____

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e. PARENT (1) TYPED OR PRINTED NAME (Last, First, Middle Initial)		(2) SIGNATURE		(3) DATE SIGNED (Month/Day/Year)	
f. WITNESS (1) TYPED OR PRINTED NAME (Last, First, Middle Initial)		(2) SIGNATURE		(3) DATE SIGNED (Month/Day/Year)	
47. VERIFICATION OF SINGLE SIGNATURE CONSENT					
SECTION VIII - STATEMENT OF NAME FOR OFFICIAL MILITARY RECORDS					
48. NAME CHANGE. If the preferred enlistment name (name given in item 2) is not the same as on your birth certificate, and it has not been changed by legal procedure prescribed by state law, and it is the same as on your Social Security number card, complete the following:					
a. NAME AS SHOWN ON BIRTH CERTIFICATE		b. NAME AS SHOWN ON SOCIAL SECURITY NUMBER CARD			
c. I hereby state that I have not changed my name through any court or other legal procedure; that I prefer to use the name of _____ by which I am known in the community as a matter of convenience and with no criminal intent. I further state that I am the same person as the person whose name is shown in item 2.					
d. WITNESS (1) TYPED OR PRINTED NAME		e. APPLICANT (1) SIGNATURE		(2) DATE SIGNED (Month/Day/Year)	
(2) SIGNATURE					