Nos. 17-1618, 17-1623, 18-107 VIDED

IN THE

Supreme Court of the United States

No. 17-1618

GERALD LYNN BOSTOCK,

Petitioner,

—v.—

CLAYTON COUNTY, GEORGIA,

Respondent.

No. 17-1623

ALTITUDE EXPRESS, INC., and RAY MAYNARD,

Petitioners,

—v.—

MELISSA ZARDA and WILLIAM MOORE, JR.,
Co-Independent Executors of the Estate of Donald Zarda,

Respondents.

(*Captions continued on inside cover*)

ON WRITS OF CERTIORARI TO THE UNITED STATES
COURTS OF APPEALS FOR THE ELEVENTH, SECOND AND SIXTH CIRCUITS

BRIEF OF *AMICI CURIAE* INTERACT: ADVOCATES FOR INTERSEX YOUTH, et al. IN SUPPORT OF EMPLOYEES

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No. 18-107

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Petitioner,

—v.—

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION and AIMEE STEPHENS,

Respondents.

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INTEREST OF *AMICI CURIAE*

Amici file this brief in support of Petitioner Gerald Lynn Bostock in No. 17-1618, Respondents Melissa Zarda and William Moore, Jr. in No. 17-1623, and Respondent Aimee Stephens in No. 18-107 (collectively, the "Employees").[1]

Lead *amicus* **interACT: Advocates for Intersex Youth** is a nonprofit organization that employs legal and policy advocacy to protect the rights of children born with variations in their sex characteristics, often called intersex. It is the largest and oldest continuously operating organization in the country exclusively dedicated to this purpose. Founded in 2006 as Advocates for Informed Choice, its mission is to end harmful, nonconsensual medical interventions on intersex children. Since its inception, interACT has continued to work to protect youth populations from harmful procedures such as clitoral reductions and sterilizations, while expanding its scope of work to include awareness-raising to end the shame and stigma faced by intersex youth. In addition, interACT oversees the largest cohort of intersex young people advocating on their own behalf, interACT Youth.

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[1] Pursuant to Sup. Ct. R. 37.6, *amici* certify that no counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici*, their employees, or their counsel made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief.

interACT is joined by the following *amici* with expertise in intersex issues:

- **Arlene B. Baratz, MD** is Coordinator of Medical and Research Affairs for the AIS-DSD Support Group and Chair of the Medical and Research Policy Committee for interACT. She is a contributor to the 2006 Clinical Guidelines for the Management of DSD in Childhood.

- **Barbara M. Chubak, MD** is an Assistant Professor in the Department of Urology at the Icahn School of Medicine at Mount Sinai Hospital and a Member of the Medical Advisory Committee of interACT.

- **Katharine Baratz Dalke, MD** is an Assistant Professor of Psychiatry at Penn State College of Medicine, member of the Medical Advisory Group and former President of the Board of interACT, and an intersex woman.

- **Georgiann Davis, PhD** is an Associate Professor of Sociology at the University of Nevada, Las Vegas and the Board President of interACT. As a medical sociologist, Davis has spent over ten years studying how intersex is experienced and contested in contemporary U.S. society. She is the author of the award-winning book CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS.

- **Intersex & Genderqueer Recognition Project** (IGRP) is the first, and leading, organization in the United States to address the

rights of people to identify as nonbinary or gender-neutral on government-issued documents. IGRP also works to stop nonconsensual, medically unnecessary procedures on intersex children. IGRP is a non-profit legal organization engaged in litigation, education, and advocacy. Its membership and advisory committee consist of intersex and transgender persons who have faced discrimination due to their nonbinary gender identities, intersex bodies, or perceived failure to conform to gender stereotypes.

- **Julie A. Greenberg, JD** is an Emeritus Professor of Law at the Thomas Jefferson School of Law. She is an internationally recognized expert on the legal issues affecting the intersex community. Her path-breaking work has been cited by numerous state, federal, and international courts. Her scholarship, including her award-winning book, INTERSEXUALITY AND THE LAW: WHY SEX MATTERS, has been quoted in hundreds of books and articles.

- **Katrina Karkazis, PhD, MPH** is the Carol Zicklin Endowed Chair at Brooklyn College, CUNY and a Senior Rsearch Fellow with the Global Health Justice Partnership at Yale University. Dr. Karkazis has spent over two decades investigating the treatment of people born with intersex traits and has published extensively in this area, including the book FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE. Dr. Karkazis has also served as an expert regarding sex-verification

policies of the International Association of Athletics Federations at the Court of Arbitration for Sport.

- **Elizabeth Reis, PhD** is a Professor at Macaulay Honors College, CUNY, author of BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX, and a Board member of interACT. She has examined hundreds of cases of "hermaphroditism" and intersex found in medical and popular literature.

- **Carl G. Streed Jr., MD MPH FACP** is the Research Lead at the Center for Transgender Medicine & Surgery, Boston Medical Center and an Assistant Professor of Medicine at the Boston University School of Medicine.

- **Sean Saifa Wall** is the co-Founder of the Intersex Justice Project and an internationally recognized intersex activist.

- **Suegee Tamar-Mattis, MD** is a family physician and a long-time advocate for the intersex community. She is a member of the medical advisory boards for interACT and the AIS-DSD Support Group, organizations that support intersex people and their families. She is also affiliated faculty at the UCSF Institute for Health & Aging. As a physician, Suegee is the founder of the Transgender Clinic at Santa Rosa Community Health Centers, which has provided health care for the trans communities of the North Bay for over 10 years.

- **Ilene Wong, MD FACS** is a practicing urologist at MidLantic Urology, author of NONE OF THE ABOVE (2015), and a Board Member of interACT.

This case raises issues central to *amici*'s mission as advocates for the intersex community. The arguments of the employer-defendants in these cases (collectively, the "Employers") assume that all humans fit neatly into one of two binary categories—"male" and "female"—and that the category a person belongs to is as easily distinguishable as their height or eye color. As *amici* will show below, this simplistic assumption is wrong. The Employers' mistaken view demeans millions of intersex persons by erasing their bodies and lives. *Amici* have a strong interest in ensuring that the Court correctly interprets Title VII to protect intersex people and others who do not conform to the Employers' incorrect assumptions about sex and gender.

SUMMARY OF ARGUMENT

The Employers argue that the word "sex" in Title VII refers only to "a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction." *Harris* Pet. 6, 26; *see also Zarda* BIO 16-17. As the Employers see it, there is no room in the definition of sex for one's own deep-seated identity, which they dismiss as a mere "subjective perception evidenced by what people profess they feel." *Harris* Pet. 2. Moreover, in the Employers' view, there are no shades of gray: sex is "limited to [a] *binary choice* between male and female" and does not "include[] other

categories." *Id.* 30 (emphasis added); *see also Zarda* BIO 16-17.

These claims about sex are not merely unsupported—they are demonstrably wrong. In particular, each year, close to 2% of infants are born intersex: *i.e.*, with combinations of traits including genitalia, internal reproductive organs, chromosomes, and/or hormones that do not fit the Employers' binary notions of "male" and "female." Traditionally, these infants have been assigned one of the two binary sex categories at birth—but that process has been widely recognized as subjective and arbitrary, and intersex persons (like non-intersex persons) often reject the assignments that were determined for them as infants prior to their ability to express their identity. Thus, sexual anatomy and physiology are *not* binary for many people, and one's "sex" *cannot* be reduced to a straightforward function of body parts.

Law and medicine have recognized this for millennia—long before Title VII was enacted in 1964. For example, both Jewish scriptures and ancient Greco-Roman writings acknowledged sex categories outside the male/female binary, and medieval canon law permitted non-binary individuals to live and marry in accordance with their own deeply felt gender identity. Unfortunately, however, intersex persons have also been (and continue to be) subjected to mistreatment and discrimination, including nonconsensual surgical interventions and, especially relevant here, adverse employment actions.

The undeniable existence of intersex people highlights the inadequacy of the Employers' simplistic, binary definition of "sex." Nature, it turns out, is not

as clean-cut as the Employers would have the Court believe. And for that reason, attempting to reduce sex to a function of genitalia, gonads, or chromosomes—while excluding one's deeply felt identity and lived experience from the calculus—is a fool's errand. To be clear, the Court does not *need* to define the concept of "sex" authoritatively to resolve these cases, because the Employees should win even under the Employers' purely anatomical definition. But if the Court does choose to define the term "sex" in these cases, it should decline the Employers' invitation to codify through that definition the same sorts of inaccurate stereotypes about "men" and "women" that Title VII seeks to transcend.

ARGUMENT

I. INTERSEX PEOPLE ARE BORN WITH BODIES THAT TRANSCEND THE MALE/FEMALE BINARY.

"Intersex" is an umbrella term describing a wide range of natural variations of physical traits—external genitals, internal sex organs, chromosomes, and hormones—that do not fit typical binary notions of male and female bodies. *See Zzyym v. Pompeo*, 341 F. Supp. 3d 1248, 1251 n.1. (D. Colo. 2018), *appeal docketed*, No. 18-1453 (10th Cir.). Each year, close to 2% of all babies are born with these variations.[2]

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[2] Anne Fausto-Sterling, SEXING THE BODY: GENDER POLITICS AND THE CONSTRUCTION OF SEXUALITY 51 (2000); Melanie Blackless et al., *How Sexually Dimorphic Are We? Review and Synthesis*, 12 Am. J. Human Biol. 151 (2000).

Intersex traits originate from variations in the embryonic sexual development process. A fertilized egg usually has two sex chromosomes: XX or XY. For the first few weeks of gestation, XX and XY embryos look the same, but they later develop in different ways depending on genetic and hormonal factors. In XY-typical development, the gonads become testes; the genital tubercle becomes a penis; and the labioscrotal folds fuse and form a scrotum. In XX-typical development, the gonads become ovaries; the genital tubercle becomes a clitoris; and the labioscrotal folds develop into the outer labia. Later, at puberty, hormones secreted by the testes or ovaries cause expression of male-typical or female-typical secondary sex characteristics, such as breast development, body hair, musculature, and depth of voice.[3]

As discussed in detail below, there are many ways in which this "typical" process can vary.[4] Such variations may present at different ages. For example, variations in external genitalia may mean an intersex child is diagnosed at birth, but other variations in internal organs or chromosomes may not become ap-

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[3] I.A. Hughes et al., *Consensus Statement on Management of Intersex Disorders*, 118 Pediatrics 488, 491 (2006); Bruce E. Wilson & William G. Reiner, *Management of Intersex: A Shifting Paradigm*, in INTERSEX IN THE AGE OF ETHICS 119 (1999); *SRY gene*, National Institutes of Health, https://ghr.nlm.nih.gov/gene/SRY (last visited May 7, 2019).

[4] Hughes, *supra* note 3, at 489; Laura Hermer, *Paradigms Revised: Intersex Children, Bioethics & The Law*, 11 Ann. Health L. 195, 204 (2002); Carla Murphy et al., *Ambiguous Genitalia in the Newborn: An Overview and Teaching Tool*, 24 J. Pediatric Adolescent Gynecology 236, 236–37 (2011).

parent until puberty or later.[5] Often, intersex infants and children are subjected to harmful "normalizing" surgical procedures—a form of discrimination and mistreatment that has been deemed a form of torture by the United Nations and condemned by every human rights organization to consider the issue. *See infra*, Point III.

Intersex children are usually "assigned" male or female at birth based on some combination of their genitalia, gonads and other internal organs, and chromosomes.[6,7] This is a largely subjective process, and experts may disagree on the "correct" sex to assign to an intersex child.[8] *See Zzyym*, 341 F. Supp. 3d at 1258 (noting "a lack of consensus as to how indi-

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[5] *Clinical Guidelines for the Management of Disorders of Sexual Development in Childhood* 2–5 (2006), Consortium on the Management of Disorders of Sex Development, https://goo.gl/bKQcES (last visited May 7, 2019) (hereinafter "Clinical Guidelines").

[6] Hughes, *supra* note 3, at 491.

[7] The emphasis on which characteristic should prevail in determining a person's sex has changed over time. For a history of intersex management, *see generally* Elizabeth Reis, BODIES IN DOUBT: AN AMERICAN HISTORY OF INTERSEX (2009).

[8] *See, e.g.*, Anne Tamar-Mattis, *Report to the Inter-American Commission on Human Rights: Medical Treatment of People with Intersex Conditions as a Human Rights Violation*, Advocates for Informed Choice 5 (March 2013), https://goo.gl/Nf7Xt7 ("There is still controversy and uncertainty about gender assignment in [cases of partial Androgen Insensitivity Syndrome], and it can go either way, depending largely on the doctor's judgment."); David A. Diamond et al., *Gender Assignment for Newborns with 46XY Cloacal Exstrophy: A 6-Year Followup Survey of Pediatric Urologists*, 186 J. Urol. 1642, 1643 (2011) (reporting that only 79 percent of surveyed clinicians agreed on a male gender assignment in 46XY cloacal exstrophy).

viduals born intersex could be classified as either 'male' or 'female'"). Some intersex people continue to identify with the binary sex they were assigned at birth throughout their lives, but many others do not.[9] For most major intersex diagnoses, 5–29% do not identify with their originally assigned sex;[10] in other cases, the rate can reach higher than 60%.[11] Physicians who treat individuals with intersex traits recognize that the key determinant of how individuals navigate sex designations in their lives is their gender identity—their internal recognition of belonging to a particular gender.[12]

The (now-defunct) Intersex Society of North America ("ISNA") recognized approximately 20 different intersex diagnoses,[13] including the following:

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[9] *Understanding Intersex and Transgender Communities* 1, interACT, https://goo.gl/CY53ZZ.

[10] Julie A. Greenberg, INTERSEXUALITY AND THE LAW 20 (2012); Hughes et al., *supra* note 3, at 491; P.S. Furtado et al., *Gender Dysphoria Associated with Disorders of Sex Development*, 9 Nat. Rev. Urol. 620 (Nov. 2012) (reporting average rates of gender dysphoria at 5% for Complete Androgen Insensitivity Syndrome, 10% for Congenital Adrenal Hyperplasia, 12.5% for Ovotesticular DSD, 20% for Partial Androgen Insensitivity Syndrome, and 29% for Mixed Gonadal Dysgenesis).

[11] Furtado et al., *supra* note 10 (reporting average rates of gender dysphoria at 57% for 17-beta-HSD3 deficiency and 63% for 5-alpha-RD2 deficiency).

[12] Peter A. Lee et al., *Global Disorders of Sex Development Update Since 2006: Perceptions, Approach and Care*, Horm. Res. Paediatr. (2016), doi: 10.1159/000442975; Clinical Guidelines, *supra* note 5, at 25–31.

[13] Clinical Guidelines, *supra* note 5, at 5–7.

a. *Congenital Adrenal Hyperplasia (CAH)*: CAH can occur in babies with XX or XY chromosomes. In CAH, a variant form of an enzyme leads to heightened production of androgenic hormones *in utero*. This can cause development to varying degrees of typically "male" physical characteristics. XX individuals with CAH may have female-typical internal organs and variations in external genitalia, such as an enlarged clitoris and/or the lack of a vaginal opening. CAH can also cause development of male-typical secondary sex characteristics like body hair, deep voice, and prominent muscles. CAH occurs in about 1 in 14,500 births.[14]

b. *5-Alpha Reductase (5-AR) Deficiency*: People with 5-AR deficiency have XY chromosomes and testes, but their bodies produce lower-than-typical levels of the hormone dihydrotestosterone (DHT), which impacts formation of the external genitalia. Many are born with external genitalia that appear typically female. In other cases, they are neither male- nor female-typical. Still other affected infants have genitalia that appear predominantly male-typical, often with an unusually small penis (micropenis) and the urethral opening on the underside of the penis (hypospadias). During puberty, people

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[14] Walter L. Miller & Selma Feldman Witchel, *Prenatal Treatment of Congenital Adrenal Hyperplasia: Risks Outweigh Benefits,* 208 Am. J. Obstetrics & Gynaecology 354, 354 (2013); Phyllis W. Speiser, et al., *Congenital Adrenal Hyperplasia Due to Steroid 21-Hydroxylase Deficiency: An Endocrine Society Clinical Practice Guideline*, 95 J. Clin. Endocrinology & Metabolism 4133–60 (2010); Blackless et al., *supra* note 2, at 154–55; *Congenital Adrenal Hyperplasia (CAH)*, ISNA, https://goo.gl/8Ki1FH; Fausto-Sterling, *supra* note 2, at 51–53 & tbl. 3.2; Clinical Guidelines, *supra* note 5, at 6.

with 5-AR deficiency develop some typically male secondary sex characteristics, such as increased muscle mass and a deep voice, but do not develop much facial or body hair. Children with 5-AR deficiency are often raised as girls. However, about half have a male gender identity and live as male beginning in adolescence or early adulthood.[15]

c. *Androgen Insensitivity Syndrome (AIS)*: People with AIS have XY chromosomes, but their cells have a reduced or absent response to testosterone or other androgens. As a result, they do not form typically male genitalia. In "complete" AIS, babies are usually born with a vaginal opening and clitoris indistinguishable from those seen in typical XX babies. The diagnosis is ordinarily not suspected until puberty, when menstruation does not occur. Investigation then reveals that these individuals are XY; that they have undescended testicles; and that neither a uterus nor ovaries are present. However, because their bodies naturally convert the testosterone they produce into estrogen, they will usually develop female-typical secondary sex characteristics at puberty so long as their gonads are not removed. In "partial" AIS, the body's cells have some (limited) response to androgens, and as a result, the external genitalia fall somewhere between typically male and typically female. While individuals with complete AIS often have a female gender identity, individuals with partial AIS are divided approximately evenly be-

[15] Hermer, *supra* note 4, at 207.

tween female and male gender identity. AIS occurs in approximately 1 in 20,000 individuals.[16]

d. *Swyer Syndrome*: In this variation, an XY child is born with "gonadal streaks" (minimally developed gonadal tissue) instead of testes or ovaries. Externally, a child with Swyer Syndrome usually appears female-typical; however, because streak gonads do not produce the sex hormones that bring about puberty, the child will not develop most secondary sex characteristics without hormone treatment.[17]

e. *Kallman Syndrome*: This variation occurs in both XX and XY children, characterized by delayed or absent puberty and an impaired sense of smell. It is a form of hypogonadotropic hypogonadism, or absence of certain hormones that direct sexual development. XY children with Kallman syndrome often have an unusually small penis (micropenis) and undescended testes. At puberty, most affected individuals do not develop typical secondary sex characteristics, such as facial hair and deepening of the voice in XY adolescents, or menstruation and breast development in XX adolescents.

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[16] Blackless et al., *supra* note 2, at 153; Fausto-Sterling, *supra* note 2, at 52; Hughes, *supra* note 3, at 491; *Androgen Insensitivity Syndrome*, ISNA, https://goo.gl/GJziJL.

[17] L. Michala, et al., *Swyer syndrome: presentation and outcomes*, 115 BJOG: An Int'l J. of Obstetrics & Gynaecology 737–41 (2008); Georgiann Davis, CONTESTING INTERSEX: THE DUBIOUS DIAGNOSIS 2 (2015); Fausto-Sterling, *supra* note 2, at 52 & tbl. 3.1; Julie A. Greenberg, *Defining Male and Female: Intersexuality and the Collision Between Law and Biology*, 41 Ariz. L. Rev. 265, 284 (1999).

f. ***Klinefelter Syndrome*****:** A child with Klinefelter syndrome has XXY sex chromosomes, as opposed to the typical patterns XX or XY. This occurs when one parent's sperm or egg has an extra X chromosome from atypical cell division. The testes and penis may be smaller than typical. Klinefelter syndrome has a prevalence of about 1 in 500 children, and is not ordinarily diagnosed before puberty.[18]

g. ***Turner Syndrome*****:** A child with Turner syndrome has the sex-chromosome pattern X, instead of the typical XX or XY. This occurs when one parent's sperm or egg is lacking an X chromosome due to atypical cell division. Children with Turner syndrome may have underdeveloped ovaries; their external genitalia generally appear female-typical, but may be less developed. They generally will not develop menstrual periods or breasts without hormone treatment. Turner syndrome affects between 1 in 2,500 and 1 in 5,000 newborns.[19]

h. ***Persistent Müllerian Duct Syndrome (PMDS)*****:** Persons with PMDS have XY chromosomes and male-typical reproductive organs and external genitalia, but also have a uterus and Fallopian tubes. This condition occurs when the Müllerian ducts—

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[18] Blackless et al., *supra* note 2, at 152; Greenberg, *supra* note 17, at 283; Albert de la Chapelle, *The Use and Misuse of Sex Chromatin Screening for Gender Identification of Female Athletes*, 256 J. Am. Med. Ass'n 1920, 1922 (1986).

[19] Kutluk Oktay, et al., *Fertility Preservation in Women with Turner Syndrome: A Comprehensive Review and Practical Guidelines*, 29 J. Pediatric & Adolescent Gynecology 409–16 (2016); Blackless et al., *supra* note 2, at 152; Greenberg, *supra* note 17, at 284.

internal structures that ordinarily break down in an XY fetus—remain and develop as they would in an XX fetus. PMDS is ordinarily not diagnosed at birth, and individuals with this variation often have a male gender identity.[20]

i. ***Ovotestes*****:** Ovotestes are gonads that contain both ovarian and testicular tissue. People with ovotestes are predominantly XX, but some are XY or have different chromosomal patterns in different cells (*see* "Mosaicism," *infra*). Some people with ovotestes have external genitalia that look typically male; others have external genitalia that look typically female; and still others have genitalia that do not look typically male or female.[21]

j. ***Mosaicism*****:** As a result of atypical cell division in early embryonic development, some people are born with a mosaic karyotype, meaning that their sex-chromosome pattern varies from cell to cell. A person with mosaicism may have an XX chromosomal pattern in some cells, and an XY pattern in others.[22]

II. LAW AND MEDICINE HAVE RECOGNIZED INTERSEX BODIES FOR MILLENNIA.

Intersex people have been recognized by law and medicine for millennia—long before Title VII was enacted in 1964. As such, the enacting Congress had

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[20] Greenberg, *supra* note 17, at 285.

[21] Hughes, *supra* note 3, at 492; Fausto-Sterling, *supra* note 2, at 21.

[22] Wilson & Reiner, *supra* note 3, at 122; Clinical Guidelines, *supra* note 5, at 7; L. Sax, *How Common is Intersex? A Response to Anne Fausto-Sterling*, 39 J. Sex. Res. 174, 175 (2002).

every reason to know of their existence and take it into account when using the term "sex."

For example, classical Jewish writings identify six sex categories—male, female, and four that would be recognized today as intersex. These variations are mentioned hundreds of times in the Jewish Mishnah, Talmud, and legal codes.[23] Intersex variations were also recognized in Greco-Roman culture. Pliny's *Natural History* refers to "those who belong to both sexes, [whom] we call by the name of hermaphrodites … [or] Androgyni."[24] The Justinian Code, too, recognized "hermaphrodites" and provided that they should be assigned whichever "sex … predominates."[25]

In medieval and Renaissance Europe, "hermaphrodites"[26] were often regarded as a third sex and recognized by law or custom.[27] Twelfth-century French

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[23] *More Than Just Male and Female: The Six Genders in Classical Judaism*, Sojourn Blog (June 1, 2015), https://goo.gl/5BsHzS; Julia M. O'Brien, ed., 1 OXFORD ENCYCLOPEDIA OF THE BIBLE AND GENDER STUDIES 311–12 (2014).

[24] Pliny, NATURAL HISTORY 7:3 (John Bostock trans., 1855), https://goo.gl/nHahlm.

[25] 1 Enactments of Justinian: The Digest or Pandects, tit. 5, para. 10 (Scott ed. 1932), https://bit.ly/2LecBPy; Michaela Koch, DISCURSIVE INTERSEXIONS: DARING BODIES BETWEEN MYTH, MEDICINE, AND MEMOIR 31.

[26] "Hermaphrodite" is considered a pejorative term in the modern era and is not recommended for use outside of historical reference.

[27] Sharon E. Preves, *Sexing the Intersexed: An Analysis of Sociocultural Responses to Intersexuality*, 27 Signs 523, 535 (2002); Cary Nederman & Jacqui True, *The Third Sex: The Idea of the Hermaphrodite in Twelfth-Century Europe*, 6 J. History of Sexuality 497, 503 (1996).

theologian Peter Cantor noted that Church law "allow[ed] a hermaphrodite … to use the [sex] organ by which (s)he is most aroused" and to "wed as a man … [or] as a woman" accordingly.[28] De Bracton's thirteenth-century treatise on English law classified people as "male, female, or hermaphrodite."[29] In a treatise regarded as a founding document of English common law, 16th-century jurist Lord Coke wrote that "[e]very heire is either a male[, a] female[, or] a[] hermaphrodite."[30] And in 1718, English legal writer Giles Jacob explained that the law "permits [hermaphrodites] to make a Choice of either of the two Sexes for the Business of Copulation, either in the Capacity of Men or Women."[31]

Victorian-era medicine divided humans into five sex classifications. In addition to male and female, this included (a) "true hermaphrodites," with both testicular and ovarian tissue (*see* "Ovotestes," *supra*); (b) "male pseudo-hermaphrodites," with testicular tissue and external genitalia that were not male-typical; and (c) "female pseudo-hermaphrodites," with

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[28] Preves, *supra* note 27, at 536–37; *see also* Peggy T. Cohen-Kettenis & Friedemann Pfafflin, *Legal Issues of Intersexuality and Transsexualism*, in TRANSGENDERISM AND INTERSEXUALITY IN CHILDHOOD AND ADOLESCENCE: MAKING CHOICES 155–56 (2003).

[29] Henry de Bracton, 2 ON THE LAWS AND CUSTOMS OF ENGLAND 31 (Thorne trans., 1968), http://amesfoundation.law.harvard.edu/Bracton/Unframed/English/v2/31.htm.

[30] Sir Edward Coke, 1 INSTITUTES OF THE LAWS OF ENGLAND 8.a; Greenberg, *supra* note 17, at 277–78.

[31] Koch, *supra* note 25, at 32; Giles Jacob, *Tractatus de Hermaphroditis: or, A Treatise of Hermaphrodites*, https://bit.ly/2ZG2PcT.

ovarian tissue and external genitalia that were not female-typical.[32] Freud discussed "hermaphroditism" in his writings,[33] as did pioneering 19th-century sexologist Richard von Krafft-Ebing.[34]

Intersex people continued to be recognized into the 20th century. A widely-read 1955 paper on "human hermaphroditism" observed that there were six factors that define "sex"—chromosomes, gonads, hormones/secondary sex characteristics, internal reproductive structures, external genitalia, and sex of rearing—and that these factors do not always align.[35] A treatise published in 1961 observed that "hermaphroditism" had "become a major research field."[36] By the time Title VII was enacted in 1964, the causes of specific intersex variations such as congenital adrenal hyperplasia, androgen insensitivity syndrome, and Klinefelter syndrome were already understood and documented.[37]

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[32] Geertje Mak, DOUBTING SEX: INSCRIPTIONS, BODIES AND SELVES IN NINETEENTH-CENTURY HERMAPHRODITE CASE HISTORIES (2012).

[33] Sigmund Freud, THREE CONTRIBUTIONS TO THE THEORY OF SEX 7 (A.A. Brill trans., 1910); Reis, *supra* note 7, at 55–81.

[34] Richard von Krafft-Ebing, PSYCHOPATHIA SEXUALIS 304 (Charles Gilbert Chaddock trans., 1894); Reis, *supra* note 7, at 55–81.

[35] John Money, et al., *An Examination of Some Basic Sexual Concepts: The Evidence of Human Hermaphroditism*, Bull. Johns Hopkins Hosp. Johns Hopkins Univ. 97 (4): 301–19 (Oct. 1955).

[36] Cohen-Kettenis & Pfafflin, *supra* note 28, at 156.

[37] Leon A. Peris, *Congenital Adrenal Hyperplasia Producing Female Hermaphroditism with Phallic Urethra*, 16 Obstetrics &

In the last few decades, an increasing number of nations have adopted a third or neutral sex category on passports and other official documents. These include Australia,[38] Bangladesh,[39] Canada,[40] Denmark,[41] Germany,[42] India,[43] Malta,[44] Nepal,[45] the

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Gynecology 156 (1960); GENETIC DIAGNOSIS OF ENDOCRINE DISORDERS 249 (Roy E. Weiss & Samuel Refetoff, eds. 2010) (describing Lawson Wilkins' demonstration of androgen resistance in 1950); Harry F. Klinefelter, *Klinefelter's syndrome: historical background and development*, 79 So. Med. J. 1089–93 (1986).

[38] *Australian Gov't Guidelines on the Recognition of Sex and Gender* (July 2013), https://www.ag.gov.au/Publications/Documents/AustralianGovernmentGuidelinesontheRecognitionofSexandGender/AustralianGovernmentGuidelinesontheRecognitionofSexandGender.pdf.

[39] Shakil Bin Mushtaq, *Bangladesh Adds Third Gender Option to Voter Forms*, The Diplomat (Jan. 19, 2018), https://thediplomat.com/2018/01/bangladesh-adds-third-gender-option-to-voter-forms/.

[40] Niraj Choksi, *Canada Introduces 'X' as a Third Sex Category for Passport Holders*, N.Y. Times (Aug. 25, 2017), https://www.nytimes.com/2017/08/25/world/americas/canada-passport-x.html.

[41] Mitch Kellaway, *Denmark Passes Groundbreaking Gender 'Self-Determination' Law*, Advocate (Sept. 3, 2014), http://www.advocate.com/politics/transgender/2014/09/03/denmark-passes-groundbreaking-gender-self-determination-law.

[42] Bill Chappell, *Germany Offers Third Gender Option on Birth Certificates*, NPR (Nov. 1, 2013), https://www.npr.org/sections/thetwo-way/2013/11/01/242366812/germany-offers-third-gender-option-on-birth-certificates.

[43] Rajesh Sampath, *India Has Outlawed Homosexuality. But It's Better to be Transgender There Than in the U.S.*, Washington Post (Jan. 29, 2015), https://www.washingtonpost.com/posteverything/wp/2015/01/29/india-has-outlawed-homosexuality-but-its-better-to-be-transgender-there-than-in-the-u-s/?utm_term=.d63d70377d2e.

Netherlands,[46] New Zealand,[47] and Pakistan.[48] In the United States, too, many jurisdictions now issue official ID documents, such as birth certificates and driver's licenses, listing a sex that "is neither female nor male." *Zzyym*, 341 F. Supp. 3d at 1256-57. These include Arkansas,[49] California,[50] Colorado,[51] the District of Columbia,[52] Indiana,[53] Maine,[54] Minnesota,[55]

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[44] Yannick Pace, *Malta Introduces "X" Marker on Passports, ID Cards and Work Permits*, Malta Today (Sept. 5, 2017), http://www.maltatoday.com.mt/news/national/80228/malta_introduces_x_marker_on_passports_id_cards_and_work_permits.

[45] Joana Plucinska, *Nepal Is the Latest Country to Acknowledge Transgender Citizens on Its Passports*, Time (Aug. 11, 2015), http://time.com/3992104/nepal-passport-third-gender-transgender/.

[46] *First Dutch Gender-Neutral Passport Issued*, BBC News (Oct. 19, 2018), https://www.bbc.com/news/world-europe-45914813.

[47] *Information About Changing Sex/Gender Identity*, https://www.passports.govt.nz/what-you-need-to-renew-or-apply-for-a-passport/information/.

[48] Zeeshan Haider, *Pakistan Issues Landmark Transgender Passport; Fight for Rights Goes On*, Reuters (June 28, 2017), https://www.reuters.com/article/us-pakistan-lgbt-passport/pakistan-issues-landmark-transgender-passport-fight-for-rights-goes-on-idUSKBN19J237.

[49] Curtis M. Wong, *Arkansas Has Been Offering a Nonbinary Gender Option on State IDs for Years*, Huffington Post (Oct. 17, 2018), https://www.huffingtonpost.com/entry/Arkansas-gender-neutral-state-id-option_us_5bc79f75e4b0d38b5874a669.

[50] SB 179, 2017 Leg., Reg. Sess. (Cal. 2017) (enacted).

[51] *FAQ: Non-binary Sex Identifier on Driver Licenses and Identification Cards*, Colo. Dep't of Revenue (Nov. 8, 2018), https://www.colorado.gov/pacific/sites/default/files/CO%20nonbinary%20sex%20identifier%20FAQ%2011.08.18.pdf.

[52] D.C. Code § 50-1401.01.

Nevada,[56] New Jersey,[57] New Mexico,[58] New York City,[59] Oregon,[60] Utah,[61] Vermont,[62] and Washington.[63]

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[53] Kellie Hwang, *Indiana Becomes the 6th State to Offer a New Gender Option on Driver's Licenses*, Indianapolis Star (Mar. 12, 2019), https://www.indystar.com/story/news/2019/03/12/indiana-drivers-licenses-now-have-x-gender-option/3138447002/.

[54] Press Release, Maine Dep't of the Sec'y of State, *Maine DMV to Offer Non-binary Gender Designation on Driver's Licenses, ID Cards* (June 11, 2018), https://www.maine.gov/sos/news/2018/genderdesignationdlid.html.

[55] Paul Walsh, *Minnesota Now Offers 'X' for Gender Option on Driver's Licenses*, Star Tribune (Oct. 3, 2018), http://www.startribune.com/minnesota-now-offers-x-for-gender-option-on-driver-s-licenses/494909961/.

[56] Kate Sosin & Nico Lang, *Gender 'X': Nevada to allow nonbinary people to self-identify on IDs*¸ NBC News (Apr. 22, 2019), https://www.nbcnews.com/feature/nbc-out/gender-x-nevada-allow-nonbinary-people-self-identify-ids-n997051.

[57] N.J. Stat. Ann. § 26:8-40.12 (West 2018).

[58] SB 20, 54th Leg., Reg. Sess. (N.M. 2019).

[59] N.Y.C. Admin. Code § 17-167.1 (Oct. 9, 2018).

[60] Or. Admin. R. 735-062-0013.

[61] Nico Lang, *Utah Among Growing Number of States Issuing Gender-Neutral IDs*, NBC News (Mar. 18, 2019), https://www.nbcnews.com/feature/nbc-out/utah-among-growing-number-states-issuing-gender-neutral-ids-n984326.

[62] Press Release, Vt. Dep't of Motor Vehicles, *New License/ID Will Allow Third Gender Option Starting This Summer* (March 13, 2019), https://dmv.vermont.gov/press-release/new-license-id-will-allow-third-gender-option-starting-this-summer.

[63] Wash. Admin. Code § 246-490-075 (2018).

III. INTERSEX PEOPLE EXPERIENCE SEVERE MISTREATMENT AND DISCRIMINATION.

Despite the longstanding recognition of intersex bodies, people with intersex variations are mistreated, discriminated against, and subjected to surgeries and forced genital examinations that many consider a form of torture.

Intersex children have often faced nonconsensual surgical intervention, including the mutilation and removal of internal and external sex organs (*e.g.*, clitoral reductions and vaginoplasties).[64] Almost always, these surgeries are performed not for any valid medical reason, but for cosmetic purposes or to ease parents' or doctors' discomfort with the child's difference.[65] These surgeries are commonly performed before the age of two, when the child is too young to understand what is taking place, let alone provide informed consent or express their own identity.[66]

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[64] Jeremy Toler, *Medical and Surgical Intervention of Patients with Differences in Sex Development* 1, Gay & Lesbian Med. Ass'n (Oct. 3, 2016); Katrina Karkazis, FIXING SEX: INTERSEX, MEDICAL AUTHORITY, AND LIVED EXPERIENCE 57–58, 60–61 (2008); Martin Kaefer & Richard C. Rink, *Treatment of the Enlarged Clitoris*, Frontiers in Pediatrics (August 2017); Jennifer Yang, et al., *Nerve Sparing Ventral Clitoroplasty: Analysis of Clitoral Sensitivity and Viability*, J. Urol., Vol. 178, 1598–1601 (October 2007); Sarah Creighton, et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development – Introduction*, J. Pediatric Urol. (2012).

[65] Toler, *supra*, note 64, at 1; Tamar-Mattis, *supra* note 8, at 2–3, 9; Hermer, *supra* note 4, at 207.

[66] Karkazis, *supra*, note 64, at 57–58; Tamar-Mattis, *supra* note 8, at 2; Daniela Truffer, "It's a Human Rights Issue!" *in* VOICES:

The consequences of these surgeries are dire and permanent. The child may be rendered sterile; may suffer a lifelong diminution or loss of sexual sensation and function; and may experience scarring and incontinence.[67] The long-lasting emotional distress and trauma experienced by children subjected to these procedures is comparable to that of child rape or sexual abuse survivors.[68] For all the harm they entail,

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PERSONAL STORIES FROM THE PAGES OF NIB – NORMALIZING INTERSEX 26–29 (James M. DuBois & Ana S. Iltis, eds., 2016) (describing a gonadectomy performed at 2 months of age); Lily C. Wang & Dix P. Poppas, *Surgical Outcomes and Complications of Reconstructive Surgery in the Female Congenital Adrenal Hyperplasia Patient: What Every Endocrinologist Should Know*, J. Steroid Biochem. & Molecular Biol. (2017); Natalie Nokoff, et al., *Prospective Assessment of Cosmesis Before and After Genital Surgery*, 13 J. Pediatric Urol. (2017): 28.e1-28.e6.

[67] Toler, *supra* note 64, at 1; *Recommendations from interACT: Advocates for Intersex Youth Regarding the List of Issues for the United States for the 59th Session of the Committee Against Torture* at 2, interACT (June 2016), https://tbinternet.ohchr.org/Treaties/CAT/Shared%20Documents/USA/INT_CAT_ICS_USA_24552_E.pdf; Tamar-Mattis, *supra* note 8, at 3–5; Peter Lee et al., *Review of Recent Outcome Data of Disorders of Sex Development (DSD): Emphasis on Surgical and Sexual Outcomes*, 8 J. Pediatric Urol. 611 (Dec. 2012); Sarah Creighton et al., *Objective Cosmetic and Anatomical Outcomes at Adolescence of Feminising Surgery for Ambiguous Genitalia Done in Childhood*, 358 Lancet 124 (2001); *"I Want To Be Like Nature Made Me": Medically Unnecessary Surgeries on Intersex Children in the U.S.* 58, Human Rights Watch & interACT (2017), https://bit.ly/2Y1N6DZ.

[68] *A Human Rights Investigation into the Medical "Normalization" of Intersex People* 17–18, S.F. Human Rights Comm'n (2005), https://goo.gl/trBnGT; Tamara Alexander, *The Medical Management of Intersexed Children: An Analogue for Childhood Sexual Abuse*, ISNA (1997), https://goo.gl/fy9jae; Karsten Schützmann, et al., *Psychological Distress, Self-Harming Behav-*

there is no persuasive evidence that these surgeries provide any benefit to the child when performed without individual consent.[69] Today, these surgeries are widely condemned by the intersex community, and have been decried by human rights groups including the United Nations, the World Health Organization, and Amnesty International.[70] Fortunately, parents are increasingly choosing to forgo invasive, medically unnecessary procedures until the child has reached the age of consent. Yet *amici* continue to receive reports from families across the United States that unnecessary genital surgery has been encouraged.[71]

The mistreatment of intersex people does not end with childhood surgery. They may be denied medical

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ior, and Suicidal Tendencies in Adults with Disorders of Sex Development, Arch. Sex. Behav. (2007).

[69] Sarah Creighton et al., *Timing and Nature of Reconstructive Surgery for Disorders of Sex Development — Introduction*, 8 J. Pediatric Urol. 602 (2012); Hughes, *supra* note 3, at 493; S.F. Human Rights Comm'n, *supra* note 68, at 19; Toler, *supra* note 64, at 1; Tamar-Mattis, *supra* note 8, at 3.

[70] Juan E. Méndez, *Report of the Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, ¶ 77, UN Doc. A/HRC/22/53 (Feb. 1, 2013); Toler, *supra* note 64, at 1; *Eliminating forced, coercive and otherwise involuntary sterilization: An interagency statement*, OHCHR, UN Women, UNAIDS, UNDP, UNFPA, UNICEF & WHO (2014), https://goo.gl/nzXm6f; *Policy Statement on the Rights of Intersex Individuals*, Amnesty International (2013); Recommendations from interACT, *supra* note 67, at 1; Tamar-Mattis, supra note 8, at 7-9.

[71] Toler, *supra* note 64, at 1; Eric Lohman and Stephani Lohman, RAISING ROSIE: OUR STORY OF PARENTING AN INTERSEX CHILD (UBCPress 2018).

treatment in adulthood by physicians who are unfamiliar with or who stigmatize intersex variations.[72] Even when doctors are willing and able to treat them, some intersex people report trauma and fear of doctors due to earlier mistreatment.[73]

Intersex people also experience discrimination in education, public services, sports, and—especially relevant here—employment.[74] Intersex individuals may be fired, or never hired, due to their naturally occurring variations in sex characteristics (or any related medical interventions).[75] They may be harassed or subjected to a hostile work environment if coworkers discover their intersex status.[76] Additionally, the United Nations recently recognized that intersex em-

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[72] Tamar-Mattis, *supra* note 8, at 2, 7; *Fact Sheet: Intersex* at 2, Free & Equal: UN for LGBT Equality (2015), https://www.unfe.org/system/unfe-65-Intersex_Factsheet_ENGLISH.pdf.

[73] S.F. Human Rights Comm'n, *supra* note 68, at 23; Tamar-Mattis, *supra* note 8, at 12; Davis, *supra note* 17, at 109–10 (quoting an intersex adult: "I don't like doctors. I don't go to the doctor very often. I don't trust doctors. That's a very triggering environment for me.").

[74] *Fact Sheet: Intersex*, *supra* note 72, at 1.

[75] Tiffany Jones, et al., *People with Intersex Variations and Employment*, in INTERSEX: STORIES AND STATISTICS FROM AUSTRALIA 145–153, https://bit.ly/2iXvw4u; Julie A. Greenberg, *Interacting in the Workplace with Individuals Who Have an Intersex Condition* 46-9 (Bloomberg BNA 2014); *Hughes v. Home Depot, Inc.*, 804 F. Supp. 2d 223 (D.N.J. 2011); *Wood v. C.G. Studios, Inc.*, 660 F. Supp. 176, 176 (E.D. Pa. 1987).

[76] *Hughes v. Home Depot, Inc.*, *supra* note 75; "[GA] Wife being bullied and discriminated at work for being intersex," REDDIT (Nov. 27, 2018), https://www.reddit.com/r/legaladvice/comments/a0zyf6/ga_wife_being_bullied_and_discriminated_at_work/.

ployees may face challenges related to "accessing personal services and changing rooms, dress codes, health care and medical attention," and called on companies to develop policies to ensure their rights are respected.[77]

IV. INTERSEX PEOPLE REFUTE THE EMPLOYERS' ARGUMENTS ABOUT HOW "SEX" SHOULD BE CONSTRUED.

As noted above, the Employers assert that "sex" in Title VII refers only to "a person's status as male or female as objectively determined by anatomical and physiological factors, particularly those involved in reproduction." *Harris* Pet. 6, 26. The above discussion should make clear that this proposed definition is woefully incomplete and not, in fact, "objective." Again, even the ancient Greeks and Romans knew that sex is not binary, and medieval thinkers knew that a complete definition must take into account not just an individual's body parts, but how they identify and live their life. Surely Congress also knew this in 1964, when Title VII was enacted.

Again, for a sizeable group of people, the "anatomical and physiological factors … involved in reproduction" differ from a presumptive male/female binary and often affirmatively point in different directions. Such cases illustrate the inadequacy of the Employ-

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[77] United Nations Office of the High Commissioner for Human Rights, *Tackling Discrimination Against Lesbian, Gay, Bi, Trans, & Intersex People: Standards of Conduct for Business* (2017), https://www.unfe.org/wp-content/uploads/2017/09/UN-Standards-of-Conduct.pdf.

ers' definition of "sex." An individual with complete AIS may have typically female external genitalia and secondary sex characteristics, such as breasts, with internal testes and an XY chromosome pattern. Another with CAH may have masculinized external genitalia and secondary sex characteristics, such as a deep voice and body hair, with female-typical internal organs and an XX chromosomal pattern. A third may have external genitalia that do not appear either typically "male" or typically "female," internal ovotestes, and mosaicism (*i.e.*, sex chromosomes that differ from cell to cell). For each of these individuals, what is their sex under the Employers' definition, which looks only to their body parts and denies their own self-knowledge?

Answering these questions based on anatomy and physiology alone would epitomize the arbitrariness that the Employers claim their definition avoids. As noted above, even physicians experienced in intersex medicine may disagree about what binary sex to assign to a given infant in cases like these. If the Employers' definition were adopted, Title VII cases would presumably devolve into a battle of experts over what a plaintiff's "objective" sex is, with each side's physicians staking out different positions on the "maleness" or "femaleness" of the plaintiff's external genitalia, gonads and other internal organs, chromosomes, hormones, and secondary sex characteristics. It is hard to imagine something more demeaning and less conducive to Title VII's goal—making one's genitalia and other sex-linked features *irrelevant* to hiring, firing, and promotion.

A definition of "sex" that encompasses an individual's identity and lived reality would avoid this ab-

surd outcome. It would also comport with medical practice: again, physicians broadly agree that the goal in assigning a binary sex to an intersex child is to predict how the child will self-identify as an adult, and that when an intersex person's gender identity differs from the binary sex they were assigned in infancy, that identity should prevail.[78] *See In re Estate of Gardiner*, 22 P.3d 1086, 1110 (Kan. Ct. App. 2001) ("In the end it is only the children themselves who can and must identify who and what they are." (quoting William Reiner, *To Be Male or Female – That is the Question*, 151 Arch. Pediatr. Adolesc. Med. 225 (1997))), *aff'd in part and rev'd in part*, 42 P.3d 120 (Kan. 2002). And if one's deeply-felt identity and lived reality are relevant in the case of persons who happen to be born with intersex traits, there is no reason why they should not be considered for *all* persons.

The Employers suggest that, because gender identity is ultimately grounded in one's internal sense of self, it is "fluid," "variable," and incapable of proof—a mere "profession[] of belief," not an "objective fact." *Harris* BIO 30. But the evidence shows that gender

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[78] *See* Lee et al., *supra* note 12 ("Overall factors to be considered for male or female assignment included probable adult gender identity (considered most important, but only tentatively predictable)…"); Clinical Guidelines, *supra* note 5, at 25-31 ("It is impossible to predict with complete confidence what gender any child will eventually come to identify with. Like all other children, children with DSDs [differences in sexual development] are given an initial gender assignment as boys or girls. But team members should be aware … that children with certain DSDs are more likely than the general population to feel that the gender assignment given to them at birth was incorrect.… It is best to let patients decide for themselves what anatomical features accord with their self identities.").

identity is a deep-seated, persistent trait that is fundamental to a person's sense of self and is evidenced by how they live their lives every day. *See, e.g.*, *Harris* BIO 5 ("I have had to live with [this] every day of my life … I need to do this for myself and for my own peace of mind and to end the agony in my soul."). Indeed, as the experiences of intersex people show, a person's gender identity may be a *more* "objective" way of defining their sex than particular anatomical or physiological traits.[79]

To be clear, the Court need not authoritatively demarcate the boundaries between who is "male" and who is "female" to resolve these cases, as the Employees should win even under the Employers' "physiological" definition of sex. For example, in No. 18-107, Petitioner asserts that Respondent Aimee Stephens's "sex" was synonymous with her "anatomy and physiology" (which Petitioner presumes was male-typical), and that her female gender identity had no relevance under Title VII. *Harris* Pet. 2. But even on these premises, Stephens still has a claim, because she was fired for not dressing and acting the way her employer believed someone with male-typical "anatomy and physiology" should dress and act. *Cf. See Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-51 (1989) (plurality). Likewise, in No. 17-1623, Petitioner asserts

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[79] In any event, "professions of belief" are already protected under Title VII—specifically, those that are religious in nature. Nobody would dare claim that, just because they "lack a fixed external referent" and could theoretically change or be falsified, religious convictions are unworthy of statutory protection. *See generally* Sue Landsittel, *Strange Bedfellows? Sex, Religion, and Transgender Identity Under Title VII*, 104 Nw. U. L. Rev. 1147, 1150 (2010).

that Respondent Donald Zarda's "sex" was strictly a function of his (presumably male-typical) "reproductive organs," and that his sexual orientation had no relevance under Title VII. *Zarda* Pet. 16. But even accepting this as true, Zarda still has a claim, because he was fired for not acting the way his employer believed someone with male-typical "reproductive organs" should act—and he would *not* have been fired if he had had female-typical "reproductive organs" and everything else (including his choice of romantic partners) were held constant. *Cf. Los Angeles Dep't of Water Power v. Manhart*, 435 U.S. 702, 711 (1978).

In short, discrimination against an employee because of their sexual orientation or transgender status is a form of discrimination because of sex, even under the Employers' view of sex. The Court, therefore, can leave the precise definition of that term for another day. However, if the Court chooses to define "sex" in these cases, it should reject the Employers' simplistic and incorrect binary definition, which rests on demonstrably false assumptions about human anatomy and physiology.

CONCLUSION

For the reasons above and in the Employees' merits briefs, the judgments in No. 17-1623 and No. 18-107 should be affirmed, and the judgment in No. 17-1618 should be reversed.

Respectfully submitted.

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