Church of the Holy Trinity v. United States

Supreme Court of the United States

Argued and submitted January 7, 1892. ; February 29, 1892, Decided

No. 143.

Reporter
143 U.S. 457 *; 12 S. Ct. 511 **; 36 L. Ed. 226 ***; 1892 U.S. LEXIS 2036 ****

CHURCH OF THE HOLY TRINITY v. UNITED STATES.

MR. JUSTICE BREWER delivered the opinion of the court.

Plaintiff . . . is a [Church] . . . . E. Walpole Warren was, prior to September, 1887, an alien residing in England. In that month the [Church] made a contract with him, by which he was to remove to the city of New York and enter into its service as rector and pastor; and in pursuance of such contract, Warren did so remove and enter upon such service. It is claimed by the United States that this contract . . . was forbidden by the act of February 26, 1885, 23 Stat. 332, c. 164, and an action was commenced to recover the penalty prescribed by that act. . . .

The first section describes the act forbidden, and is in these words:

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That from and after the passage of this act it shall be unlawful for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation, or in any way assist or encourage the importation or migration of any alien or aliens, any foreigner or foreigners, into the United States, its Territories, or the District of Columbia, under contract or agreement, parol or special, express or implied, made previous to the importation or migration of such alien or aliens, foreigner or foreigners, to perform labor or service of any kind in the United States, its Territories, or the District of Columbia."

It must be conceded that the act of the corporation is within the letter of this section, for the relation of rector to his church is one of service, and implies labor on the one side with compensation on the other. Not only are the general words labor and service both used, but also, as it were to guard against any narrow interpretation and emphasize a breadth of meaning, to them is added "of any kind;" and, further, . . . the fifth section, which makes specific exceptions, among them professional actors, artists, lecturers, singers and domestic servants, strengthens the idea that every other kind of labor and service was intended to be reached by the first section. While there is great force to this reasoning, we cannot think Congress intended to denounce with penalties a transaction like that in the present case. It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers. . . . This is not the substitution of the will of the judge for that of the legislator, for frequently words of general meaning are used in a statute, words broad enough to include an act in question, and yet a consideration of the whole legislation, or

of the circumstances surrounding its enactment, or of the absurd results which follow from giving such broad meaning to the words, makes it unreasonable to believe that the legislator intended to include the particular act. . . .

It will be seen that words as general as those used in the first section of this act were by that decision limited, and the intent of Congress with respect to the act was gathered partially, at least, from its title. Now, the title of this act is, "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories and the District of Columbia." Obviously the thought expressed in this reaches only to the work of the manual laborer, as distinguished from that of the professional man. . . .

Again, another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the attention of the legislative body. . . .

It appears . . . from the petitions, and in the testimony presented before the committees of Congress, that it was this cheap unskilled labor which was making the trouble, and the influx of which Congress sought to prevent. It was never suggested that we had in this country a surplus of brain toilers, and, least of all, that the market for the services of Christian ministers was depressed by foreign competition. Those were matters to which the attention of Congress, or of the people, was not directed. So far, then, as the evil which was sought to be remedied interprets the statute, it also guides to an exclusion of this contract from the penalties of the act. . . .

We find, therefore, that the title of the act, the evil which was intended to be remedied, the circumstances surrounding the appeal to Congress, the reports of the committee of each house, all concur in affirming that the intent of Congress was simply to stay the influx of this cheap unskilled labor.

But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation. The commission to Christopher Columbus, prior to his sail westward, is from "Ferdinand and Isabella, by the grace of God, King and Queen of Castile," etc., and recites that "it is hoped that by God's assistance some of the continents and islands in the ocean will be discovered," etc. . . .

Language of similar import may be found in the . . .various charters granted to the . . . colonies. . . .

Coming nearer to the present time, the Declaration of Independence recognizes the presence of the Divine in human affairs in these words: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness." . . .

If we examine the constitutions of the various States we find in them a constant recognition of religious obligations. . . .

Even the Constitution of the United States, which is supposed to have little touch upon the private life of the individual, contains in the First Amendment a declaration common to the constitutions of all the States, as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof," etc. . . .

If we pass beyond these matters to a view of American life as expressed by its laws, its business, its customs and its society, we find everywhere a clear recognition of the same truth. . . . that this is a Christian nation. In the face of all these, shall it be believed that a Congress of the United States intended to make it a misdemeanor for a church of this country to contract for the services of a Christian minister residing in another nation? . . .

The construction invoked cannot be accepted as correct. It is a case where there was presented a definite evil, in view of which the legislature used general terms with the purpose of reaching all phases of that evil, and thereafter, unexpectedly, it is developed that the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against. It is the duty of the counts, under those circumstances, to say that, however broad the language of the statute may be, the act, although within the letter, is not within the intention of the legislature, and therefore cannot be within the statute.

The judgment will be reversed.

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Yates v. United States

Supreme Court of the United States

November 5, 2014, Argued; February 25, 2015, Decided

No. 13-7451

Reporter
574 U.S. 528 *;

Opinion

Justice **Ginsburg** announced the judgment of the Court and delivered an opinion, in which The Chief Justice, Justice **Breyer**, and Justice **Sotomayor** join.

John Yates, a commercial fisherman, caught undersized red grouper in federal waters in the Gulf of Mexico. To prevent federal authorities from confirming that he had harvested undersized fish, Yates ordered a crew member to toss the suspect catch into the sea. For this offense, he was charged with, and convicted of, violating *18 U.S.C. §1519*, which provides:

> "Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

Yates . . . maintains that fish are not trapped within the term "tangible object," as that term is used in *§1519*.

[3]*Section 1519* was enacted as part of the Sarbanes-Oxley Act of 2002, *116 Stat. 745*, legislation designed to protect investors and restore trust in financial markets following the collapse of Enron Corporation. A fish is no doubt an object that is tangible; fish can be seen, caught, and handled, and a catch, as this case illustrates, is vulnerable to destruction. But it would cut *§1519* loose from its financial-fraud mooring to hold that it encompasses any and all objects, whatever their size or significance, destroyed with obstructive intent. Mindful that in Sarbanes-Oxley, Congress trained its attention on corporate and accounting deception and cover ups, we conclude that a matching construction of *§1519* is in order: A tangible object captured by *§1519*, we hold, must be one used to record or preserve information. . . .

II

The Sarbanes-Oxley Act, all agree, was prompted by the exposure of Enron's massive accounting fraud and revelations that the company's outside auditor, Arthur Andersen LLP, had systematically destroyed potentially incriminating documents. The Government acknowledges

that §1519 was intended to prohibit, in particular, corporate document-shredding to hide evidence of financial wrongdoing. . . .

In the Government's view, §1519 extends beyond the principal evil motivating its passage. The words of §1519, the Government argues, support reading the provision as a general ban on the spoliation of evidence, covering all physical items that might be relevant to any matter under federal investigation.

Yates urges a contextual reading of §1519, tying "tangible object" to the surrounding words, the placement of the provision within the Sarbanes-Oxley Act, and related provisions enacted at the same time, in particular §1520 and §1512(c)(1). Section 1519, he maintains, targets not all manner of evidence, but records, documents, and tangible objects used to preserve them, *e.g.*, computers, servers, and other media on which information is stored.

We agree with Yates and reject the Government's unrestrained reading. "Tangible object" in §1519, we conclude, is better read to cover only objects one can use to record or preserve information, not all objects in the physical world.

A

[6]The ordinary meaning of an "object" that is "tangible," as stated in dictionary definitions, is "a discrete . . . thing," Webster's Third New International Dictionary 1555 (2002), that "possess[es] physical form," Black's Law Dictionary 1683 (10th ed. 2014). From this premise, the Government concludes that "tangible object," as that term appears in §1519, covers the waterfront, including fish from the sea.

Whether a statutory term is unambiguous, however, does not turn solely on dictionary definitions of its component words. Rather, "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole." . . .

B

Familiar interpretive guides aid our construction of the words "tangible object" as they appear in §1519.

We note first §1519's caption: "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." That heading conveys no suggestion that the section prohibits spoliation of any and all physical evidence, however remote from records. Neither does the title of the section of the Sarbanes-Oxley Act in which §1519 was placed, §802: "Criminal penalties for altering documents." 116 Stat. 800. Furthermore, §1520, the only other provision passed as part of §802, is titled "Destruction of corporate audit records" and addresses only that specific subset of records and documents. While these headings are not commanding, they supply cues that Congress did not intend "tangible object" in §1519 to sweep within its reach physical objects of every kind, including things no one would describe as records, documents, or devices closely associated with them. . . .

The contemporaneous passage of §1512(c)(1), which was contained in a section of the Sarbanes-Oxley Act discrete from the section embracing §1519 and §1520, is also instructive. Section 1512(c)(1) provides:

> "(c) Whoever corruptly—
>
> "(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding
>
> .....
>
> "shall be fined under this title or imprisoned not more than 20 years, or both."

The legislative history reveals that §1512(c)(1) was drafted and proposed after §1519. The Government argues, and Yates does not dispute, that §1512(c)(1)'s reference to "other object" includes any and every physical object. But if §1519's reference to "tangible object" already included all physical objects, as the Government and the dissent contend, then Congress had no reason to enact §1512(c)(1): Virtually any act that would violate §1512(c)(1) no doubt would violate §1519 as well, for §1519 applies to "the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States . . . or in relation to or contemplation of any such matter," not just to "an official proceeding."

The Government acknowledges that, under its reading, §1519 and §1512(c)(1) "significantly overlap." Nowhere does the Government explain what independent function §1512(c)(1) would serve if the Government is right about the sweeping scope of §1519. We resist a reading of §1519 that would render superfluous an entire provision passed in proximity as part of the same Act. . . .

The words immediately surrounding "tangible object" in §1519—"falsifies, or makes a false entry in any record [or] document"—also cabin the contextual meaning of that term. As explained in Gustafson v. Alloyd Co., 513 U.S. 561, 115 S. Ct. 1061, 131 L. Ed. 2d 1 (1995), we rely on the principle of *noscitur a sociis*—a word is known by the company it keeps—to "avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." Id. at 575, 115 S. Ct. 1061, 131 L. Ed. 2d 1). . . .

"Tangible object" is the last in a list of terms that begins "any record [or] document." The term is therefore appropriately read to refer, not to any tangible object, but specifically to the subset of tangible objects involving records and documents, *i.e.,* objects used to record or preserve information. . . .

This moderate interpretation of "tangible object" accords with the list of actions §1519 proscribes. The section applies to anyone who "alters, destroys, mutilates, conceals, covers up, *falsifies*, or *makes a false entry in* any record, document, or tangible object" with the requisite obstructive intent. (Emphasis added.) The last two verbs, "falsif[y]" and "mak[e] a false entry in," typically take as grammatical objects records, documents, or things used to record or preserve information, such as logbooks or hard drives. It would be unnatural, for example, to describe a killer's act of wiping his fingerprints from a gun as "falsifying" the murder weapon. But it would not be strange to refer to "falsifying" data stored on a hard drive as simply "falsifying" a hard drive. . . .

Having used traditional tools of statutory interpretation to examine markers of congressional intent within the Sarbanes-Oxley Act and §1519 itself, we are persuaded that [18]an aggressive interpretation of "tangible object" must be rejected. It is highly improbable that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record keeping. . . .

C

Finally, if our recourse to traditional tools of statutory construction leaves any doubt about the meaning of "tangible object," as that term is used in §1519, we would invoke the rule that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." That interpretative principle is relevant here, where the Government urges a reading of §1519 that exposes individuals to 20-year prison sentences for tampering with *any* physical object that *might* have evidentiary value in *any* federal investigation into *any* offense, no matter whether the investigation is pending or merely contemplated, or whether the offense subject to investigation is criminal or civil. . . .

For the reasons stated, we resist reading §1519 expansively to create a coverall spoliation of evidence statute, advisable as such a measure might be. Leaving that important decision to Congress, we hold that a "tangible object" within §1519's compass is one used to record or preserve information. The judgment of the U.S. Court of Appeals for the Eleventh Circuit is therefore reversed, and the case is remanded for further proceedings.

It is so ordered.

Dissent

Justice **Kagan**, with whom Justice **Scalia**, Justice **Kennedy**, and Justice **Thomas** join, dissenting.

A criminal law, *18 U.S.C. §1519*, prohibits tampering with "any record, document, or tangible object" in an attempt to obstruct a federal investigation. This case raises the question whether the term "tangible object" means the same thing in §1519 as it means in everyday language—any object capable of being touched. The answer should be easy: Yes. The term "tangible object" is broad, but clear. Throughout the U.S. Code and many States' laws, it invariably covers physical objects of all kinds. And in §1519, context confirms what bare text says: All the words surrounding "tangible object" show that Congress meant the term to have a wide range. That fits with Congress's evident purpose in enacting §1519: to punish those who alter or destroy physical evidence—*any* physical evidence—with the intent of thwarting federal law enforcement.

The plurality instead interprets "tangible object" to cover "only objects one can use to record or preserve information." *Ante, at 536, 191 L. Ed. 2d, at 75*. In my view, conventional tools of statutory construction all lead to a more conventional result: A "tangible object" is an object that's tangible. I would apply the statute that Congress enacted and affirm the judgment below.

I

While the plurality starts its analysis with §1519's heading, I would begin with §1519's text. When Congress has not supplied a definition, we generally give a statutory term its ordinary meaning. As the plurality must acknowledge, the ordinary meaning of "tangible object" is "a discrete thing that possesses physical form. A fish is, of course, a discrete thing that possesses physical form. See generally Dr. Seuss, One Fish Two Fish Red Fish Blue Fish (1960). So the ordinary meaning of the term "tangible object" in §1519, as no one here disputes, covers fish (including too-small red grouper).

That interpretation accords with endless uses of the term in statute and rule books as construed by courts. Dozens of federal laws and rules of procedure (and hundreds of state enactments) include the term "tangible object" or its first cousin "tangible thing"—some in association with documents, others not. . . . To my knowledge, no court has ever read any such provision to exclude things that don't record or preserve data; rather, all courts have adhered to the statutory language's ordinary (*i.e.*, expansive) meaning. . . . No surprise, then, that—until today—courts have uniformly applied the term "tangible object" in §1519 in the same way. . . .

That is not necessarily the end of the matter; I agree with the plurality (really, who doesn't?) that context matters in interpreting statutes. . . . But . . . here the text and its context point the same way.

Begin with the way the surrounding words in §1519 reinforce the breadth of the term at issue. *Section 1519* refers to "any" tangible object, thus indicating (in line with *that* word's plain meaning) a tangible object "of whatever kind." Webster's Third New International Dictionary 97 (2002). This Court has time and again recognized that "any" has "an expansive meaning," bringing within a statute's reach *all* types of the item (here, "tangible object") to which the law refers. And the adjacent laundry list of verbs in §1519 ("alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry") further shows that Congress wrote a statute with a wide scope. Those words are supposed to ensure—just as "tangible object" is meant to—that §1519 covers the whole world of evidence-tampering, in all its prodigious variety. . . .

III

If none of the traditional tools of statutory interpretation can produce today's result, then what accounts for it? The plurality offers a clue when it emphasizes the disproportionate penalties §1519 imposes if the law is read broadly. . . .

But whatever the wisdom or folly of §1519, this Court does not get to rewrite the law. "Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress." *Rodgers, 466 U.S., at 484, 104 S. Ct. 1942, 80 L. Ed. 2d 492*. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

I respectfully dissent.

Bostock v. Clayton Cty.

Supreme Court of the United States

October 8, 2019, Argued ; June 15, 2020*, Decided

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

.**Judges:** Gorsuch, J., delivered the opinion of the Court, in which Roberts, C. J., and Ginsburg, Breyer, Sotomayor, and Kagan, JJ., joined. Alito, J., filed a dissenting **[***9]** opinion, in which Thomas, J., joined. Kavanaugh, J., filed a dissenting opinion.

Opinion by: GORSUCH

Opinion

JUSTICE **GORSUCH** delivered the opinion of the Court.

[*1737] [230]** Sometimes small gestures can have unexpected consequences. Major initiatives practically guarantee them. In our time, few pieces of federal legislation rank in significance with the *Civil Rights Act of 1964*. [1] There, in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids.

Those who adopted the *Civil Rights Act* might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years . . . . But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.

I

Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee's homosexuality or transgender status. . . .

II

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* Together with No. 17-1623, *Altitude Express, Inc., et al. v. Zarda et al., as Co-Independent Executors of the Estate of Zarda*, on certiorari to the United States Court of Appeals for the Second Circuit, and No. 18-107, *R. G. & G. R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Commission et al.*, on certiorari to the United States Court of Appeals for the Sixth Circuit.

This Court normally interprets a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people's representatives. And we would deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.

With this in mind, our task is clear. We must determine the ordinary public meaning of Title VII's command that it is "unlawful . . . for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." *§2000e-2(a)(1)*. . . .

A

The only statutorily protected characteristic at issue in today's cases is "sex"—and that is also the primary term in Title VII whose meaning the parties dispute. Appealing to roughly contemporaneous dictionaries, the employers say that, as used here, the term "sex" in 1964 referred to "status as either male or female [as] determined by reproductive biology." . . .

Still, that's just a starting point. The question isn't just what "sex" meant, but what Title VII says about it. Most notably, the statute prohibits employers from taking certain actions "because of " sex. And, as this Court has previously explained, "the ordinary meaning of 'because of ' is 'by reason of ' or 'on account of.'" In the language of law, this means that Title VII's "because of " test incorporates the "'simple'" and "traditional" standard of but-for causation. That form of causation is established whenever a particular outcome would not have happened "but for" the purported cause. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause. . . .

B

From the ordinary public meaning of the statute's language at the time of the law's adoption, a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. . . .

The statute's message for our cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. That's because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex. Consider, for example, an employer with two employees, both of whom are attracted to men. The two individuals are, to the employer's mind, materially identical in all respects, except that one is a man and the other a woman. If the employer fires the male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague. Put differently, the employer intentionally singles out an employee to fire based in part on the employee's sex, and the affected employee's sex is a but-for cause of his discharge. . . .

III

What do the employers have to say in reply? . . .Maybe most intuitively, the employers assert that discrimination on the basis of homosexuality and transgender status aren't referred to as sex discrimination in ordinary conversation. If asked by a friend (rather than a judge) why they were fired, even today's plaintiffs would likely respond that it was because they were gay or transgender, not because of sex. According to the employers, that conversational answer, not the statute's strict terms, should guide our thinking and suffice to defeat any suggestion that the employees now before us were fired because of sex.

But this submission rests on a mistaken understanding of what kind of cause the law is looking for in a Title VII case. In conversation, a speaker is likely to focus on what seems most relevant or informative to the listener. So an employee who has just been fired is likely to identify the primary or most direct cause rather than list literally every but-for cause. To do otherwise would be tiring at best. But these conversational conventions do not control Title VII's legal analysis, which asks simply whether sex was a but-for cause. . . .

Ultimately, the employers are forced to abandon the statutory text and precedent altogether and appeal to assumptions and policy. Most pointedly, they contend that few in 1964 would have expected Title VII to apply to discrimination against homosexual and transgender persons. And whatever the text and our precedent indicate, they say, shouldn't this fact cause us to pause before recognizing liability?. . . .

This Court has explained many times over many years that, when the meaning of the statute's terms is plain, our job is at an end. The people are entitled to rely on the law as written, without fearing that courts might disregard its plain terms based on some extratextual consideration. . . .

Admittedly, the employers take pains to couch their argument in terms of seeking to honor the statute's "expected applications" rather than vindicate its "legislative intent." But the concepts are closely related. One could easily contend that legislators only intended expected applications or that a statute's purpose is limited to achieving applications foreseen at the time of enactment. However framed, the employer's logic impermissibly seeks to displace the plain meaning of the law in favor of something lying beyond it. . . .

Ours is a society of written laws. Judges are not free to overlook plain statutory commands on the strength of nothing more than suppositions about intentions or guesswork about expectations. In Title VII, Congress adopted broad language making it illegal for an employer to rely on an employee's sex when deciding to fire that employee. We do not hesitate to recognize today a necessary consequence of that legislative choice: An employer who fires an individual merely for being gay or transgender defies the law. . . .

It is so ordered.

Dissent

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. . . .

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. . . .

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

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. 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. 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 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. . . .

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. . . .

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. . . . We now have the four exemplars listed below, with the discharged employees crossed out:

~~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. . . .

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. [The key question is how] the terms of a statute [would] have been understood by ordinary people at the time of enactment. . .

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?

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. . . .

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 ___, 207 L. Ed. 2d, at 247*.

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

I respectfully dissent.

Dissent

Justice Kavanaugh

Like many cases in this Court, this case boils down to one fundamental question: Who decides?. . . Under the Constitution's separation of powers, the responsibility to amend Title VII belongs to Congress and the President in the legislative process, not to this Court.

The political branches are well aware of this issue. . . . Although both the House and Senate have voted at different times to prohibit sexual orientation discrimination, the two Houses have not yet come together with the President to enact a bill into law.

The policy arguments for amending Title VII are very weighty. The Court has previously stated, and I fully agree, that gay and lesbian Americans "cannot be treated as social outcasts or as inferior in dignity and worth."

But we are judges, not Members of Congress. And in Alexander Hamilton's words, federal judges exercise "neither Force nor Will, but merely judgment." Under the Constitution's separation of powers, our role as judges is to interpret and follow the law as written, regardless of whether we like the result. Our role is not to make or amend the law. As written, Title VII does not prohibit employment discrimination because of sexual orientation.

I

Title VII makes it unlawful for employers to discriminate because of "race, color, religion, sex, or national origin." *42 U. S. C. §2000e-2(a)(1)*. As enacted in 1964, Title VII did not prohibit other forms of employment discrimination, such as age discrimination, disability discrimination, or sexual orientation discrimination. . . .

To prohibit age discrimination and disability discrimination, this Court did not unilaterally rewrite or update the law. Rather, Congress and the President enacted new legislation, as prescribed by the Constitution's separation of powers.

For several decades, Congress has considered numerous bills to prohibit employment discrimination based on sexual orientation. But as noted above, although Congress has come close, it has not yet shouldered a bill over the legislative finish line.

In the face of the unsuccessful legislative efforts (so far) to prohibit sexual orientation discrimination, judges may not rewrite the law simply because of their own policy views. Judges may not update the law merely because they think that Congress does not have the votes or the fortitude. Judges may not predictively amend the law just because they believe that Congress is likely to do it soon anyway.

If judges could rewrite laws based on their own policy views, or based on their own assessments of likely future legislative action, the critical distinction between legislative authority and judicial authority that undergirds the Constitution's separation of powers would collapse, thereby threatening the impartial rule of law and individual liberty. . . . If judges could, for example, rewrite or update securities laws or healthcare laws or gun laws or environmental laws simply based on their own policy views, the Judiciary would become a democratically illegitimate super-legislature—unelected, and hijacking the important policy decisions reserved by the Constitution to the people's elected representatives.

Because judges interpret the law as written, not as they might wish it were written, the first 10 U. S. Courts of Appeals to consider whether Title VII prohibits sexual orientation discrimination all said no. Some 30 federal judges considered the question. All 30 judges said no, based on the text of the statute. 30 out of 30.

But in the last few years, a new theory has emerged. To end-run the bedrock separation-of-powers principle that courts may not unilaterally rewrite statutes, the plaintiffs here (and, recently, two Courts of Appeals) have advanced a novel and creative argument. They contend that discrimination "because of sexual orientation" and discrimination "because of sex" are actually not separate categories of discrimination after all. Instead, the theory goes, discrimination because of sexual orientation always qualifies as discrimination because of sex: When a gay man is fired because he is gay, he is fired because he is attracted to men, even though a similarly situated woman would not be fired just because she is attracted to men. According to this theory, it follows that the man has been fired, at least as a literal matter, because of his sex.

Under this literalist approach, sexual orientation discrimination automatically qualifies as sex discrimination, and Title VII's prohibition against sex discrimination therefore also prohibits sexual orientation discrimination—and actually has done so since 1964, unbeknownst to everyone. Surprisingly, the Court today buys into this approach.

For the sake of argument, I will assume that firing someone because of their sexual orientation may, as a very literal matter, entail making a distinction based on sex. But to prevail in this case with their literalist approach, the plaintiffs must also establish one of two other points. The plaintiffs must establish that courts, when interpreting a statute, adhere to literal meaning rather than ordinary meaning. Or alternatively, the plaintiffs must establish that the ordinary meaning of "discriminate because of sex"—not just the literal meaning—encompasses sexual orientation discrimination. The plaintiffs fall short on both counts.

First, courts must follow ordinary meaning, not literal meaning. And courts must adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

There is no serious debate about the foundational interpretive principle that courts adhere to ordinary meaning, not literal meaning, when interpreting statutes. As Justice Scalia explained, "the good textualist is not a literalist." Or as Professor Eskridge stated: The "prime directive in statutory interpretation is to apply the meaning that a reasonable reader would derive from the text of the law," so that "for hard cases as well as easy ones, the *ordinary meaning* (or the 'everyday meaning' or the 'commonsense' reading) of the relevant statutory text is the anchor for statutory interpretation."

Judges adhere to ordinary meaning for two main reasons: rule of law and democratic accountability. A society governed by the rule of law must have laws that are known and understandable to the citizenry. And judicial adherence to ordinary meaning facilitates the democratic accountability of America's elected representatives for the laws they enact. Citizens and legislators must be able to ascertain the law by reading the words of the statute. Both the rule of law and democratic accountability badly suffer when a court adopts a hidden or obscure interpretation of the law, and not its ordinary meaning.

Consider a simple example of how ordinary meaning differs from literal meaning. A statutory ban on "vehicles in the park" would literally encompass a baby stroller. But no good judge would interpret the statute that way because the word "vehicle," in its ordinary meaning, does not encompass baby strollers. . . .When there is a divide between the literal meaning and the ordinary meaning, courts must follow the ordinary meaning. . . .

A literalist approach to interpreting phrases disrespects ordinary meaning and deprives the citizenry of fair notice of what the law is. It destabilizes the rule of law and thwarts democratic accountability. . . .

Bottom line: Statutory Interpretation 101 instructs courts to follow ordinary meaning, not literal meaning, and to adhere to the ordinary meaning of phrases, not just the meaning of the words in a phrase.

Second, in light of the bedrock principle that we must adhere to the ordinary meaning of a phrase, the question in this case boils down to the ordinary meaning of the phrase "discriminate because of sex." Does the ordinary meaning of that phrase encompass discrimination because of sexual orientation? The answer is plainly no.

On occasion, it can be difficult for judges to assess ordinary meaning. Not here. Both common parlance and **c**ommon legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination—back in 1964 and still today.

As to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex. As commonly understood, sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The majority opinion acknowledges the common understanding, noting that the plaintiffs here probably did not tell their friends that they were fired because of their sex. That observation is clearly correct. In common parlance, Bostock and Zarda were fired because they were gay, not because they were men.

Contrary to the majority opinion's approach today, this Court has repeatedly emphasized that common parlance matters in assessing the ordinary meaning of a statute, because courts heed how "most people" "would have understood" the text of a statute when enacted.

Consider the employer who has four employees but must fire two of them for financial reasons. Suppose the four employees are a straight man, a straight woman, a gay man, and a lesbian. The employer with animosity against women (animosity based on sex) will fire the two women. The employer with animosity against gays (animosity based on sexual orientation) will fire the gay man and the lesbian. Those are two distinct harms caused by two distinct biases that have two different outcomes. To treat one as a form of the other—as the majority opinion does—misapprehends common language, human psychology, and real life.

It also rewrites history. . . . The women's rights movement was not (and is not) the gay rights movement, although many people obviously support or participate in both. So to think that sexual orientation discrimination is just a form of sex discrimination is not just a mistake of language and psychology, but also a mistake of history and sociology.

Importantly, an overwhelming body of federal law reflects and reinforces the ordinary meaning and demonstrates that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. Since enacting Title VII in 1964, Congress has never treated sexual orientation discrimination the same as, or as a form of, sex discrimination. Instead, Congress has consistently treated sex discrimination and sexual orientation discrimination as legally distinct categories of discrimination. . . .The story is the same with bills proposed in Congress. . .

.Federal regulations likewise reflect that same understanding. . . .The States have proceeded in the same fashion. . . And it is the common understanding in this Court as well.

In sum, all of the usual indicators of ordinary meaning—common parlance, common usage by Congress, the practice in the Executive Branch, the laws in the States, and the decisions of this Court—overwhelmingly establish that sexual orientation discrimination is distinct from, and not a form of, sex discrimination. The usage has been consistent across decades, in both the federal and state contexts. . . .

To tie it all together, the plaintiffs have only two routes to succeed here. Either they can say that literal meaning overrides ordinary meaning when the two conflict. Or they can say that the ordinary meaning of the phrase "discriminate because of sex" encompasses sexual orientation discrimination. But the first flouts long-settled principles of statutory interpretation. And the second contradicts the widespread ordinary use of the English language in America.

II

Until the last few years, every U. S. Court of Appeals to address this question concluded that Title VII does not prohibit discrimination because of sexual orientation. . . .

So what changed from the situation only a few years ago when 30 out of **[***178]** 30 federal judges had agreed on this question? Not the text of Title VII. The law has not changed. Rather, the judges' decisions have evolved.

To be sure, the majority opinion today does not openly profess that it is judicially updating or amending Title VII. But the majority opinion achieves the same outcome by seizing on literal meaning and overlooking the ordinary meaning of the phrase "discriminate because of sex." . . .

The majority opinion deflects that critique by saying that courts should base their interpretation of statutes on the text as written, not on the legislators' subjective intentions. Of course that is true. No one disagrees. . . .

But in my respectful view, the majority opinion makes a fundamental mistake by confusing ordinary meaning with subjective intentions. . . .

The majority opinion insists that it is not rewriting or updating Title VII, but instead is just humbly reading the text of the statute as written. But that assertion is tough to accept. Most everyone familiar with the use of the English language in America understands that the ordinary meaning of sexual orientation discrimination is distinct from the ordinary meaning of sex discrimination. . . . Common sense distinguishes the two.

As a result, many Americans will not buy the novel interpretation unearthed and advanced by the Court today. Many will no doubt believe that the Court has unilaterally rewritten American vocabulary and American law—a "statutory amendment courtesy of unelected judges." Some will surmise that the Court succumbed to "the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others."

I have the greatest, and unyielding, respect for my colleagues and for their good faith. But when this Court usurps the role of Congress, as it does today, the public understandably becomes

confused about who the policymakers really are in our system of separated powers, and inevitably becomes cynical about the oft-repeated aspiration that judges base their decisions on law rather than on personal preference. The best way for judges to demonstrate that we are deciding cases based on the ordinary meaning of the law is to walk the walk, even in the hard cases when we might prefer a different policy outcome.

***

In judicially rewriting Title VII, the Court today cashiers an ongoing legislative process, at a time when a new law to prohibit sexual orientation discrimination was probably close at hand. . . . It was therefore easy to envision a day, likely just in the next few years, when the House and Senate took historic votes on a bill that would prohibit employment discrimination on the basis of sexual orientation. It was easy to picture a massive and celebratory Presidential signing ceremony in the East Room or on the South Lawn.

It is true that meaningful legislative action takes time—often too much time, especially in the unwieldy morass on Capitol Hill. But the Constitution does not put the Legislative Branch in the "position of a television quiz show contestant so that when a given period of time has elapsed and a problem remains unsolved by them, the federal judiciary may press a buzzer and take its turn at fashioning a solution." The proper role of the Judiciary in statutory interpretation cases is "to apply, not amend, the work of the People's representatives," even when the judges might think that "Congress should reenter the field and alter the judgments it made in the past."

Instead of a hard-earned victory won through the democratic process, today's victory is brought about by judicial dictate—judges latching on to a novel form of living literalism to rewrite ordinary meaning and remake American law. Under the Constitution and laws of the United States, this Court is the wrong body to change American law in that way. The Court's ruling "comes at a great cost to representative self-government." And the implications of this Court's usurpation of the legislative process will likely reverberate in unpredictable ways for years to come.

Notwithstanding my concern about the Court's transgression of the Constitution's separation of powers, it is appropriate to acknowledge the important victory achieved today by gay and lesbian Americans. Millions of gay and lesbian Americans have worked hard for many decades to achieve equal treatment in fact and in law. They have exhibited extraordinary vision, tenacity, and grit—battling often steep odds in the legislative and judicial arenas, not to mention in their daily lives. They have advanced powerful policy arguments and can take pride in today's result. Under the Constitution's separation of powers, however, I believe that it was Congress's role, not this Court's, to amend Title VII. I therefore must respectfully dissent from the Court's judgment.