Coinciding with Pride Month, the U.S. Supreme Court ruled on June 15, 2020 that the "sex" prong in Title VII employment discrimination suits extends to gay and transgender people. *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686 (U.S. June 15, 2020). In pertinent part, the statute makes it "unlawful. . . for an employer. . . to discriminate. . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e–2(a)(1). The Court reasoned that the phrase "because of" does not require that sex – male or female biology – be the "only" reason for the discrimination. Rather, it need only be a "but-for" cause, meaning a "partial" reason.

The Court Explains in Laymen's Terms:

> **(1)** Firing a gay man: Had the gay man been female, i.e. of the opposite "sex," then any romantic relationships with men would effectively be heterosexual, and he would not have been fired. Thus, his "sex" was at least a partial reason, a but-for cause, of the firing.
>
> **(2)** Firing a transgender woman: Had the transgender woman been born female, i.e. of the opposite "sex," then her birth sex and her gender would have corresponded, and she would have effectively lived as a cisgender woman. Thus, her "sex" was at least a partial reason, a but-for cause, of the firing.

The Court Analogies To Previous Cases:

> **(1)** Refusing to hire a mother with young children because women bear more family obligations than do similarly situated men: Had the mother been male, i.e. of the opposite "sex," then she would have been deemed a father with young children, and not rejected. Therefore, her "sex" was at least a partial reason, a but-for cause, of the refusal. *See Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613 (1971).
>
> **(2)** Requiring female employees to contribute more to pension funds because women have longer life expectancies than men: Had the women been male, i.e. of the opposite sex, then they would not have been required to contribute more. Therefore, their "sex" was at least a partial reason, a but-for cause, for the higher payments owed. *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370, 55 L. Ed. 2d 657 (1978).

The Court Rejects Employer Arguments

> **(1)** The employers argued that, if asked in casual conversation why they were fired, each of the plaintiffs would have answered that it was

"because" they were gay or transgender, not because of sex. The Court responded that causation in casual conversation differs from causation in Title VII analysis. Specifically, the former focuses narrowly on what's "most relevant," whereas the latter broadly includes any "but-for cause," which includes any "partial reason."

(2) The employers argued that the categories in Title VII must be read narrowly; otherwise, Congress would have expressly included homosexuality and transgender status. The Court responded that Congress knows which prepositional phrases are narrow and which are not, and "because of" is not. *C.f.* 11 U.S.C. § 525 (prohibiting discrimination against people "solely because" of their debtor status); 22 U.S.C. § 2688 (prohibiting U.S. ambassador status to those "primarily because of" their financial contributions to political campaigns). Thus, "because of" must be read broadly to mean any "but-for cause."

(3) The employers argued that legislative history of the 1964 Civil Rights Act shows that the "sex" prong exclusively meant male vs. female biology. The Court responded that it only looks to legislative history to interpret *ambiguous* terms. A term is ambiguous in only two situations: (1) the word at the time of the statute's enactment had more than one meaning; or (2) the word has acquired more than one meaning since the time of the statue's enactment. Here, the first situation does not apply because "sex" meant only one thing in 1964: male vs. female biology. *C.f.* National Motor Vehicle Theft Act ("vehicle" in early 1900s could *either* mean conveyance on land, water, or air; *or* things that move on land). Nor does the second situation apply because "sex" today still means the same thing as it did in 1964: male vs. female biology. *C.f.* Federal Arbitration Act ("contracts of employment" in 1925 covered those with employees and independent contractors, *whereas* those today cover only those with employees). Thus, "sex" is not an ambiguous terms, so we do not take the second step of invoking legislative history.

(4) The employers argued that the June 15, 2020 result is completely unexpected from the 1964 vantage point. The Court provides two responses. First, the result is not necessarily unexpected. Not long after 1964, gay and transgender people did begin filing Title VII complaints, so at least *some* people foresaw its broader application. Also, during debates over the Equal Rights Amendment, some counseled that its language—which was strikingly similar to Title VII's—might also protect gay people from discrimination. Second, even if the application is unexpected, a refusal to apply laws to groups that were politically unpopular at the time of a law's passage "would tilt the scales of justice in favor of the strong or popular and neglect the promise that all persons are entitled to the benefit of the law's terms." *Bostock v. Clayton Cty., Georgia*, No. 17-1618, 2020 WL 3146686, at *15 (U.S. June 15, 2020). The Court cites its previous

encounter with the Americans with Disabilities Act's directive that no "public entity. . . discriminate against any qualified individual with a disability," noting that "no one batted an eye" at its application to post offices, but some did "demand a closer look" when it came to prisons. *Id.* Thus, *Bostock* is not necessarily unexpected, and even if it were, that is an unjust reason to deny protection.

(5) Finally, the employers argued that complying with Title VII's requirement may require them to violate their religious convictions. The Court responded that Congress has addressed this concern by including an express, statutory exemption for religious organizations. 42 U.S.C. § 2000e–1(a). It also recognized case law and a statute which, together, displace application of employment discrimination laws to religiously-motivated employment decisions. *See Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012); Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. § 2000bb *et seq.* Thus, religious employers are sufficiently protected that the broadening of the sex prong in Title VII remains constitutional.