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Title VII Protects Gay, Transgender; Significant Discussion Of Statutory Interpretation; Textualism Redefined?: *Bostock v. Clayton County*, 2020 U.S.LEXIS 3253 (June 15, 2020) (Gorsuch, J.)

Brief Summary: *Bostock* involved three cases, in two of which (*Bostock*, *Zarda*) gay persons sued under Title VII, alleging unlawful discrimination based on sexual orientation, and in one of which (*Stephens*) a transgender person sued under Title VII, alleging unlawful discrimination based on transgender status. *Bostock*, 2020 U.S.LEXIS 3253 at *10 - *12 The Court held, 6-3, that discrimination on the basis of sexual orientation or transgender status is discrimination on the basis of sex and therefore is prohibited by Title VII: "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." *Id* at 3253 at *9.

The majority acknowledged that its construction of Title VII "might not have [been] anticipated" by the Congress that passed the law in 1964 but held that the "express terms of Title VII controlled the outcome: "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, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. 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*." *Id* at *9-*10 (emphasis added).

Why *Bostock* Matters: Foremost, *Bostock* settles that Title VII prohibits discrimination against gay and transgender persons. Even the dissenting Justices agreed that this should be the law. They dissented because in their view it was not the Court's prerogative, but rather that of Congress, to make this change. *See, e.g.*, id at *125-*126 (Alito, J. dissenting) ("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

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treated with the dignity, consideration and fairness that everyone deserves. But the authority of this Court is limited to saying what the law is."); *id* at 184-185 (Kavanaugh, J. dissenting) ("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.").

But perhaps just as important over the long run as the *Bostock* majority's construction of Title VII is the majority's process of statutory construction.

Both the majority and the dissenting Justices agreed that a statute, such as Title VII, should be "*interpret[ed] … in accord with the ordinary public meaning of its terms at the time of its enactment*." *Id* at *12 (majority opinion) (emphasis added); *see also id* at *91 (Alito, J., dissenting) *id* at *159-*161 (Kavanugh, J., dissenting). As the majority explained, "[i]f 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." *Id* at *12-*13 (citation omitted).

The dissenting opinions amassed a formidable case that such an analysis results clearly in the conclusion that in 1964, when the Civil Rights Act was passed, the ordinary public meaning of "discriminate because of sex" "did not encompass discrimination because of sexual orientation" and/or transgender status and therefore Title VII does not prohibit discrimination on the basis of sexual orientation or transgender status, however desirable such a prohibition may be. *Id* at *167; *see generally* *59-*185.

What is noteworthy is that the *Bostock* majority's decision to nonetheless construe Title VII to prohibit discrimination on the basis of sexual orientation or transgender status, while claiming to be following a textualist approach, opens the door for a litigant to contend in a future case that textualism supports a given construction of federal law even in the face of substantial evidence that such construction in fact contravenes the ordinary public meaning of the statutory text at the time of adoption. At a minimum, under *Bostock*, if it is applied straightforwardly in the future, evidence of ordinary public meaning at the time of a law's passage will not be accorded as much weight as it once was.

In particular, a fair reading of *Bostock* suggests that *Bostock* is authority for at least the following forms of argument in future litigation involving statutory construction.

First, a statute may be interpreted by focusing on the meaning of specific words or small phrases rather than the meaning of the text at issue as a whole and by employing the literal meaning of specific words or small phrases rather than the ordinary public meaning. The majority defined its task as "determin[ing] 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,'" for which task the majority "orient[ed] ourselves to the time of the statute's adoption,

here 1964…" *Id* at *13. But the majority examined the meaning of particular discrete terms ("sex," "because of," "discriminate" and "individual") rather than meaning of the statutory text at issue as a whole and employed the literal definition of these terms. *Id* at *13-*19; *see also id*. at *178-*179 (Kavanaugh, J., dissenting). By this process, the majority concluded that "[a]n employer violates Title VII when it intentionally fires an individual employee based in part on sex" (*id* at *20), that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex" (*id* at *20-*21) and, therefore, "[a]n employer who fires an individual merely for being gay or transgender defies the law," i.e. Title VII. *Id* at *58. The majority reached this result even though the dissents set forth compelling evidence and argument that "Congress" "indisputably did not" "in 1964" "outlaw…" "discrimination because of sexual orientation or gender identity." *Id* at 62.[2]

Second, the majority's response to the substantial evidence cited by the dissents that the ordinary public meaning of Title VII when adopted did not prohibit discrimination based on sexual orientation or gender identity likewise offers new arguments for use in future statutory construction cases. For example, the *Bostock* majority contended that within a few years after Title VII's passage "at least some people foresaw" that Title VII might prohibit discrimination based on sexual orientation or transgender status because "not long after the law's passage, gay and transgender employees began filing Title VII complaints" and "during debates over the Equal Rights Amendment, … [some] … counseled that its language – which was strikingly similar to Title VII's – might also protect homosexuals from discrimination." *Id* at *47-*48. "Why isn't that enough," the majority asked, "to demonstrate that today's result isn't totally unexpected?" *Id* at *48. This can support an argument that evidence of even a small group of persons offering an alternative construction of a law not long after its passage calls into question substantial evidence that the ordinary public meaning of the law at that time in fact was otherwise. More fundamentally, *Bostock* is clearly authority for the general proposition that a statute can be construed in a manner that contradicts a great deal of evidence that the ordinary public meaning of the statute when passed was otherwise. *Id, passim.*

None of the foregoing is to disagree with *Bostock*'s result. It is rather to point out that, in order to obtain that result, the majority, notwithstanding its' claims to be following a textualist approach, in fact employed a different form of textualism than that advanced by Justice Scalia and like-minded jurists and that this form of textualism now may be employed by advocates in future cases. *See, e.g., id* at *61. (Alito, J., dissenting) ("The Court attempts to pass off its decision as the inevitable product of the textualist school of statutory interpretation championed by our late

[2] As Justice Kavanaugh pointed out: "[C]ourts 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." *Id* at 159. "In light of the bedrock principle that we must adhere to the ordinary meaning of a phrase," Justice Kavanaugh wrote, "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 common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination – back in 1964 and still today." *Id* at 167-68; *see also, e.g., id* at *84 - *115 (Alito, J., dissenting); *id* at *168-*178 (Kavanaugh, J. dissenting)

colleague Justice Scalia, but no one should be fooled."). Whether the Supreme Court and other courts will accept such arguments, or limit *Bostock* to its compelling facts, remains to be seen.