No. 15-1720

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

KIMBERLY HIVELY
Plaintiff-Appellant,

v.

IVY TECH COMMUNITY COLLEGE, SOUTH BEND,
Defendant-Appellee.

Appeal from the United States District Court
For the Northern District of Indiana
Case No. 34-cv-01791-RL-CAN
The Honorable Rudy Lozano

BRIEF OF AMICI CURIAE NATIONAL CENTER FOR LESBIAN RIGHTS AND GLBTQ LEGAL ADVOCATES & DEFENDERS IN SUPPORT OF APPELLANT'S PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Shannon P. Minter
Christopher F. Stoll
NATIONAL CENTER FOR LESBIAN RIGHTS
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257

Mary L. Bonauto
GLBTQ LEGAL ADVOCATES & DEFENDERS
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-1350

Attorneys for Amici Curiae

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-1720

Short Caption: Kimberly Hively v. Ivy Tech Community College, South Bend

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

National Center for Lesbian Rights

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

National Center for Lesbian Rights

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

National Center for Lesbian Rights has no parent corporations

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

National Center for Lesbian Rights has no share of stock

Attorney's Signature: s/ Shannon P. Minter Date: 8/24/2016

Attorney's Printed Name: Shannon P. Minter

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: National Center for Lesbian Rights
870 Market Street, Suite 370, San Francisco, CA 94012

Phone Number: (415) 392-6257 Fax Number: (415) 392-8442

E-Mail Address: sminter@nclrights.org

APPEARANCE & CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 15-1720

Short Caption: Kimberly Hively v. Ivy Tech Community College, South Bend

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

[ ] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

GLBTQ Legal Advocates & Defenders

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

GLBTQ Legal Advocates & Defenders

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

GLBTQ Legal Advocates & Defenders has no parent corporations

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

GLBTQ Legal Advocates & Defenders has no share of stock

Attorney's Signature: s/ Mary L. Bonauto Date: 8/24/2016

Attorney's Printed Name: Mary L. Bonauto

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes** X **No** ____

Address: GLBTQ Legal Advocates & Defenders
30 Winter Street, Suite 800, Boston, MA 02108

Phone Number: (617) 426-1350 Fax Number: (617) 426-3594

E-Mail Address: mbonauto@glad.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE RULE DOES NOT WARRANT STARE DECISIS PROTECTION. 3

A. The Rule Is Unworkable and Leads to Inconsistent Results. 3

B. There Is No Reliance Interest That Needs Protection. 5

C. The Rule Is Out of Step With Related Principles of Law. 5

CONCLUSION 7

CERTIFICATION OF COMPLIANCE WITH FRAP 32 8

CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Hively v. Ivy Tech Comty. Coll., No. 15-1720, 2016 U.S. App. LEXIS 13746 (7th Cir. July 28, 2016) passim

Oncale v. Sundowner Offshore Servs., 523 U.S. 75 (1998) 6

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992) 2, 5

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) 5, 6

Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000) 6

Tate v. Showboat Marina Casino Partnership, 431 F.3d 580 (7th Cir. 2005) 2

Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) 2, 5, 6, 7

U.S. v. Sykes, 598 F.3d 334 (7th Cir. 2010) 2, 5

INTEREST OF AMICI CURIAE[1]

The National Center for Lesbian Rights ("NCLR") is a national non-profit legal organization dedicated to protecting and advancing the civil rights of lesbian, gay, bisexual, and transgender people and their families through litigation, public policy advocacy, and public education. Since its founding in 1977, NCLR has played a leading role in securing fair and equal treatment for LGBT people and their families in cases across the country involving constitutional and civil rights. NCLR has a particular interest in promoting equal opportunity for LGBT people in the workplace through legislation, policy, and litigation, and represents LGBT people in employment and other cases in courts throughout the country.

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals and people living with HIV and AIDS. GLAD has an enduring interest in ensuring that employees receive full and complete redress for the violation of their civil rights in the workplace.

---

[1] The parties have consented to the filing of this brief. Counsel for the parties have not authored this brief in whole or in part. The parties and counsel for the parties have not contributed money that was intended to fund preparing or submitting the brief. No person other than the amici curiae contributed money that was intended to fund preparing or submitting the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has held that Title VII excludes sexual orientation discrimination in a series of cases that the panel traces back to *Ulane v. Eastern Airlines, Inc*., 742 F.2d 1081 (7th Cir. 1984). *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720, 2016 U.S. App. LEXIS 13746, at *6 and *9 (7th Cir. July 28, 2016). However, the Court has not reexamined these cases in light of contemporary law. Undertaking such an examination, the panel found the rule incoherent, leaving lower courts "coming up short on rational answers," *id*. at *14; resulting in a "jumble of inconsistent precedents," *id.* at *21; and creating "an odd state of affairs" with the "unsatisfactory results seen in the confused hodge-podge of cases [the panel] detail[s]," *id.* at *34, *36. The panel reaffirmed the rule nonetheless, citing considerations of stare decisis. *Id*. at *6-*7.

The panel's reliance on stare decisis was erroneous. As this Court has recognized, stare decisis must give way when a precedent has proven "unsound in principle or unworkable in practice." *U.S. v. Sykes*, 598 F.3d 334, 338 (7th Cir. 2010). When deciding whether to revisit a prior holding, the Court considers: "'whether the rule has proven to be intolerable simply in defying practical workability; whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation; whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.'" *Tate v. Showboat Marina Casino Partnership*, 431 F.3d 580, 583 (7th Cir. 2005) (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 854-55 (1992) (citations omitted)). These considerations strongly support revisiting the Court's decades-old statements

and rulings about sexual orientation discrimination beginning with *Ulane*. Because the panel's decision did not consider these factors and concerns a question of exceptional importance, rehearing and rehearing en banc are warranted.

ARGUMENT

I. THE RULE DOES NOT WARRANT STARE DECISIS PROTECTION

A. The Rule Is Unworkable and Leads to Inconsistent Results.

As the panel recognized, sexual orientation discrimination and sex discrimination are inextricably linked. "Discrimination against gay, lesbian, and bisexual employees comes about because their behavior is seen as failing to comply with the quintessential gender stereotype about what men and women ought to do—for example, that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men." *Hively*, 2016 U.S. App. 13746 at *19.

Even independent of gender stereotypes, sexual orientation discrimination is based on sex in the most direct and literal way. Sexual orientation is a relational characteristic, defined by being (or desiring to be) associated with persons of a particular sex. As such, sexual orientation discrimination is necessarily based on the gender of a person's intimate associates. Even when a plaintiff does not allege discrimination based on being in a same-sex relationship, such discrimination is "the very essence of sexual orientation discrimination. It is discrimination based on the nature of an associational relationship—in this case, one based on gender." *Id*. at *51.

Because no clear distinction between sexual orientation discrimination and sex discrimination exists, courts' attempts to exclude sexual orientation discrimination from Title VII's scope have led to "a jumble of inconsistent precedents." *Id*. at 21. One group of decisions "essentially throw[s] out the baby with the bathwater," *id.*, by insisting "the gender non-conformity

claim cannot be tainted with any hint of a claim that the employer also engaged in sexual orientation discrimination," *id.* at *24. This line of cases has led to results that are not only "odd," *id.,* but inequitable, in that lesbian, gay, and bisexual plaintiffs have been left unprotected against gender-based harassment that would have been deemed actionable had identical conduct been directed toward their heterosexual co-workers.

Other decisions "address the problem of the ill-defined lines between sexual orientation and gender non-conformity claims by carefully trying to tease the two apart and looking only at those portions of the claim that appear to address cognizable gender non-conformity discrimination." *Id.* at *26. But attempts to disentangle the evidence in this manner inevitably end up drawing arbitrary and unpredictable lines. Plaintiffs alleging similar facts may find their claims deemed evidence of sex discrimination by one judge and evidence of sexual orientation discrimination by another, based on such elusive questions as, "for purposes of Title VII, should a court deem that pushing a factory button 'with pizzazz' is a trait associated with gay men or straight women? It is difficult to know." *Id*. at *28. "This type of gerrymandering to exclude some forms of gender-norm discrimination but not others leads to unsatisfying results." *Id*. at *46. [2]

[2] The panel suggests that some sexual orientation discrimination may not qualify as gender discrimination because, in targeting a gay person, the individual has a belief about gay people that is not associated with gender. *Id.* at *29. Such an analysis, which attempts to look beyond the personal characteristic protected by the law to some reason associated with such persons, is antithetical to our law. For example, if an employer fires a woman for being pregnant, it matters not whether he did so because he believes she is promiscuous or spends too much money or will be a bad parent. For purposes of Title VII liability, all that matters is that her pregnancy was a factor in his decision to fire her. Moreover, as the panel clearly explains elsewhere in its opinion, these are precisely the kinds of misadventures that arise because of the flawed efforts to separate sexual orientation discrimination and sex discrimination.

Despite these reservations, the panel concluded that "this court must continue to extricate the gender nonconformity claims from the sexual orientation claims." *Id.* at *30. The panel offered no guidance, however, as to how district courts should attempt to do so, other than to muddle along and be content "with the unsatisfactory results seen in the confused hodge-podge of cases" discussed in the panel's opinion. *Id.* at *36. The inconsistency and unpredictability generated by such an incoherent "rule" do not warrant stare decisis. Maintaining such an unworkable rule undermines "stability, predictability and respect for the courts"—defeating the very goals that stare decisis is designed to serve. *U.S. v. Sykes*, 598 F.3d at 338.

B. There Is No Reliance Interest That Needs Protection.

The current rule is not "subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, …." *Planned Parenthood*, 505 U.S. at 854-55. To the contrary, as noted above, the absence of a principled way to determine how courts will rule on Title VII claims by lesbian, gay, or bisexual plaintiffs has left both employers and employees bereft of clear guidance. The instability and unpredictability inherent in such a scheme thwart reliance, leaving litigants to guess as to whether courts will categorize particular facts as evidence of sexual orientation discrimination or as evidence of sex discrimination. Overruling the exclusion would not cause hardship or inequity; rather it would eliminate the inconsistent and inequitable results made inevitable by the existing rule.

C. The Rule Is Out of Step With Related Principles of Law.

The rule has increasingly contradicted related principles of Title VII law. In *Ulan*e, this Court held that Title VII prohibited only discrimination "against women because they are women and against men because they are men." 742 F.2d at 1085. But *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989), rejected that narrow view, holding that Title VII also prohibits discrimination

based on non-conformity to gender-based stereotypes. *Id.* at 250-251; *see also*, *e.g.*, *Schwenk v. Hartford*, 204 F.3d 1187, 1201 (9th Cir. 2000) ("The initial judicial approach taken in cases such as *Holloway* [and *Ulane*] has been overruled by the logic and language of *Price Waterhouse*."). In the wake of *Price Waterhouse*, no principled line can differentiate sexual orientation discrimination claims from other claims based on gender non-conformity: "all gay, lesbian, and bisexual persons fail to comply with the sine qua non of gender stereotypes – that all men should form intimate relationships only with women, and all women should form intimate relationships only with men." *Hively*, 2016 U.S. App. LEXIS 13746 at *35.

This Court's decision in *Ulane* also held that Congress did not intend to protect "homosexuals" when it enacted Title VII. *Ulane,* 742 F.2d at 1084-1085. But in *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998), the Supreme Court repudiated the notion that the scope of Title VII may be restricted to the specific types of discrimination that Congress had in mind when it enacted the law. Congress may not have been concerned about male-on-male sexual harassment when it enacted Title VII; however, "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id*. at 79. "We see no justification in the statutory language . . . for a categorical rule excluding same-sex harassment claims from the coverage of Title VII." *Id*. The same analysis applies to claims based on sexual orientation discrimination.

The exclusion of sexual orientation discrimination claims from Title VII also creates a stark difference in how this Court treats claims of associational discrimination based on race and sex, respectively. *Hively*, 2016 U.S. App. LEXIS 13746 at *50-51 (noting that such differential treatment violates the U.S. Supreme Court's command that Title VII be applied equally to all protected categories). In sum, in the 30+ years since *Ulane,* the rule has become increasingly at

odds with related principles of Title VII law. For that reason as well, it does not warrant insulation from review by the stare decisis doctrine.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for panel rehearing or rehearing en banc.

DATED: August 24, 2016

Respectfully submitted,

By: s/ Shannon P. Minter
Shannon P. Minter
Christopher F. Stoll
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
(415) 392-6257

By: s/ Mary L. Bonauto
Mary L. Bonauto
GLBTQ Legal Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
(617) 426-1350

Attorneys for *Amicus Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that the foregoing brief complies with the type-volume limitations as follows:

1. Exclusive of the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), the brief complies with Fed. R. App. P. Rules 32(b)(2) and 29(d) regarding page length.

2. The brief was prepared in proportionally spaced typeface using Microsoft Word, Times Roman, 12 point for text and 12 point for footnotes, in compliance with Fed. R. App. P. 32(a)(7)(b) and Seventh Circuit Rule 32(b).

3. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Fed. R. App. P. 32(a)(7)(C), may result in the Court's striking the brief and imposing sanctions against the person signing this brief.

Dated: August 24, 2016

s/ Mary L. Bonauto
Attorney for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the appellate ECF system on August 24, 2016.

I certify that all participants in the case are registered ECF users and that service will be accomplished by the ECF system.

I hereby certify that I filed 30 paper copies of the foregoing brief with the Court by Federal Express overnight delivery on August 26, 2016.

s/ Mary L. Bonauto