No. 16-748

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MATTHEW CHRISTIANSEN,
Plaintiff/Appellant,
v.

OMNICOM GROUP, INC., DDB WORLDWIDE COMMUNICATIONS GROUP, INC., JOE CIANCIOTTO, PETER HEMPEL, and CHRIS BROWN,
Defendants/Appellees.

On Appeal from the United States District Court
For the Southern District of New York
Hon. Katherine Polk Failla, United States District Judge

BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF CHRISTIANSEN'S PETITION FOR REHEARING EN BANC

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Rule 35(b) Statement of Counsel

The panel decision reaffirms this Court's precedent that Title VII of the Civil Rights Act, 42 U.S.C. §§2000e *et seq.*, does not prohibit employment discrimination based on sexual orientation. Panel: 2, 9 (citing *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)). The panel explained that it "lack[ed] the power" to reconsider this precedent. *Id.* The question of whether sexual orientation discrimination is cognizable under Title VII is one of exceptional importance. Just last month, the en banc Seventh Circuit reversed its longstanding precedent and held that sexual orientation discrimination is encompassed within Title VII's prohibition against sex discrimination. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339 (7th Cir. 2017) (en banc). Thus, this Court's precedent directly conflicts with the authoritative, very recent decision of another United States Court of Appeals. It is also in tension with *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), which holds that Title VII prohibits discrimination based on an individual's association with persons of another race. Consideration by the full Court is therefore appropriate.

Consideration by the full court is also timely. Other pending cases raise the same question. *See, e.g.*, *Cargian v. Breitling USA*, No.16-3592

(2d Cir.) (en banc petition filed April 19, 2017). An en banc decision in this case and/or in *Cargian* would resolve the question.

/s/ Barbara L. Sloan

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Statement of Interest

The Equal Employment Opportunity Commission is charged with enforcing Title VII. 42 U.S.C. §§2000e-5(f)(1), 2000e-16(b). The question Christiansen is asking the en banc Court to decide — whether sexual orientation discrimination claims are cognizable under Title VII — is important. Because such claims necessarily involve consideration of an individual's sex, gender-based associational discrimination, and sex

stereotyping, they fall within Title VII's ban on sex discrimination. Resolution of the question will materially affect the Commission's enforcement efforts. For these reasons, the Commission participated as amicus curiae in the initial appeal of this case. We now offer our views in support of en banc review.

Statement of the Issue

Is discrimination based on sexual orientation cognizable under Title VII as a form of sex discrimination?

Statement of the Case

Matthew Christiansen, a gay man, worked as an associate creative director at DBB Worldwide Communications Corp., an international advertising agency. He alleges that his employer violated Title VII because his supervisor engaged in a pattern of humiliating harassment targeting his "effeminacy" and sexual orientation.

The district court dismissed his suit based on circuit precedent distinguishing between actionable sexual stereotyping and non-actionable sexual orientation discrimination. *Christiansen v. Omnicom Grp.*, 167 F.Supp.3d 598 (S.D.N.Y. 2016). In the court's view, "no coherent line can be drawn between these two sorts of claims." *Id.* at 620. Nevertheless, "the prevailing law in this Circuit … is that such a line must be drawn." *Id.*

Drawing that line, the court concluded that Christiansen was alleging harassment primarily because he is gay, not because he failed to conform to sexual stereotypes. *Id.* at 621-22. Thus, his claim was not actionable.

The panel reversed. The panel noted it was bound by *Simonton* and *Dawson* until those cases are overruled by the en banc Court or the Supreme Court. However, the panel concluded, the references to effeminacy and submissiveness in Christiansen's complaint sufficed to state a plausible Title VII claim based on gender stereotyping. Panel: 9-11. In the panel's view, the district court's contrary ruling reflects "confusion" within the Circuit about the relationship between gender stereotyping and sexual orientation discrimination claims. *Simonton* and *Dawson* merely hold that "being gay, lesbian, or bisexual, standing alone, does not constitute nonconformity with a gender stereotype that can give rise to a cognizable gender stereotyping claim." *Id.* at 11-12. They do not make it "especially difficult" for gay plaintiffs to bring stereotyping claims. *Id.*

Chief Judge Katzmann, joined by District Judge Brodie, concurred. According to the concurrence, Christiansen and his amici advanced three "persuasive" theories, none previously addressed by the Court, for why sexual orientation discrimination is, "almost by definition," discrimination because of sex. Concurrence: 1-2.

First, gay, lesbian, and bisexual plaintiffs could show they were treated in a manner that would be different "but for" their sex. Concurrence: 2-6 (citing, *e.g.*, *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)). Sexual orientation discrimination meets the but-for test because sexual orientation "'cannot be defined or understood without reference to sex'" — to "whether a person is attracted to people of the same sex or opposite sex (or both, or neither)." *Id.* at 3-4 (citing *Baldwin v. Foxx*, 2015 WL 4397641, at *5 (EEOC July 5, 2015)).

Second, plaintiffs could show they were discriminated against due to the sex of their associates. The concurrence reasoned that *Holcomb*, 521 F.3d at 138, already holds that discrimination against an individual based on the race of his associates is actionable under Title VII. Associational discrimination based on sex should likewise be actionable. Concurrence: 6-9.

Third, plaintiffs could show they were discriminated against for failing to conform to some gender stereotype, including the stereotype of opposite-sex attraction. The concurrence reasoned that, having conceded in *Dawson* that "'stereotypical notions of how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality,'" 398 F.3d at 218, it is "logically untenable" to "insist that

[the stereotype that 'real men should date only women'] is outside of the gender stereotype discrimination prohibition articulated in *Price Waterhouse* [*v. Hopkins*, 490 U.S. 228 (1989)]." Concurrence: 9-12. The "binary distinction that *Simonton* and *Dawson* establish between permissible gender stereotype discrimination claims and impermissible sexual orientation claims" requires factfinders to decide whether "the true cause" of the discrimination was the plaintiff's "perceived effeminacy or his sexual orientation" — an "extremely difficult task." *Id.* at 11.

Finally, the concurrence noted, the legal landscape has changed since *Simonton* and *Dawson* were decided; even the Commission has taken a "fresh look" at the issue. Concurrence: 14. In light of these changes, when "the appropriate occasion" arises, it would "make sense" to revisit that precedent. *Id.* at 1-2, 14-15.

Argument

The question presented is whether this Court should revisit its precedent and hold that sexual orientation discrimination is unlawful because it violates Title VII's ban on sex discrimination. Despite reversing the dismissal of Christiansen's sex discrimination claims, the panel did not reach this broader question, explaining that its hands were tied. That is not

true for this Court. The Court should grant rehearing en banc and overturn its outdated and unworkable law.

A. This Circuit's precedent conflicts with the recent en banc decision in *Hively*.

Title VII generally prohibits employers from treating employees differently based on sex (42 U.S.C. §2000e-2(a)); "gender must be irrelevant to employment decisions." *Price Waterhouse*, 490 U.S. at 240. Sexual orientation discrimination violates this prohibition for three reasons. First, it involves impermissible consideration of an employee's sex, and fails the Supreme Court's "simple test" for sex discrimination: "whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Manhart*, 435 U.S. at 711 (footnote omitted). Second, it relies on gender-based associational discrimination and, so, conflicts with this Court's recognition that race-based associational discrimination violates Title VII. *See Holcomb*, 521 F.3d at 139. Third, it treats employees adversely for failing to conform to gender norms or stereotypes, including the stereotype of opposite-sex attraction.

Although the concurring judges found these reasons "persuasive" (Panel: 2), the principle that sexual orientation discrimination violates Title VII is not the law in this Circuit. In *Simonton*, this Court held that "Title VII

does not prohibit harassment or discrimination because of sexual orientation." 232 F.3d at 35; *see also Dawson*, 398 F.3d at 217-19.

Simonton cannot be reconciled with *Hively*. The panel there, like the panel here, concluded it lacked the authority to reconsider existing circuit precedent which similarly held sexual orientation discrimination not cognizable under Title VII. After rehearing the case, the en banc Seventh Circuit reversed. The Court held that "discrimination on the basis of sexual orientation is a form of sex discrimination" under both the "tried-and-true comparative method" which, as interpreted by the Court, includes "the gender non-conformity line of cases," and the associational discrimination method from *Holcomb*, 521 F.3d 130. *Hively*, 853 F.3d at 341-48.

The en banc *Hively* decision is "authoritative" and very recent. *See* Fed.R.App.P 35(b)(1)(B). Indeed, it was issued shortly after the panel decision in this case, which it cites, noting the concurrence. 853 F.3d at 342. As such, this case presents a question of exceptional importance. Like the Seventh Circuit, the Court should vote to rehear this case en banc and hold that claims of sexual orientation discrimination are cognizable as sex discrimination.

B. The rule in *Simonton* and *Dawson* is illogical and unworkable.

This Court should revisit *Simonton* and *Dawson* because the current rule is illogical and unworkable. As the panel explained, certain gay, lesbian, and bisexual plaintiffs may bring discrimination claims using a version of the gender non-conformity/stereotyping theory from *Price Waterhouse*, where the plaintiff was denied partnership because she was perceived as too masculine (490 U.S. at 250-51). Similarly, this Court permits "stereotypically feminine gay men" and "stereotypically masculine lesbian women" to pursue gender non-conformity/stereotyping claims. *See* Panel: 12.

But *Dawson* stresses that gender stereotyping claims "should not be used to 'bootstrap protection for sexual orientation into Title VII.'" 398 F.3d at 218 (citing *Simonton*, 232 F.3d at 38). Coverage under this theory is therefore limited to situations where the plaintiff can show that he or she was targeted for being too feminine or too masculine.

Restricting application of the theory in this way makes no sense. As the concurrence explained, sexual orientation discrimination is often, if not always, motivated by a desire to enforce heterosexually-defined gender norms, the stereotype at work being that "real men should date women, and not men." Concurrence: 10-11 (citation omitted). *See also Dawson*, 398

F.3d at 218 (noting that "[s]tereotypical notions of how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality"). A gay man harassed because his employer disapproves of homosexuality should receive Title VII protection regardless of whether he is "stereotypically feminine" or simply attracted to men instead of women.

The restriction — what the concurrence calls the "binary distinction" between permissible gender stereotype and impermissible sexual orientation discrimination claims — has also proved unworkable. In assessing gender stereotyping claims, factfinders must attempt to ascertain whether the "true cause" of the alleged discrimination was the plaintiff's perceived effeminacy or his sexual orientation. Concurrence: 11. Such line-drawing is "exceptionally difficult" at best. *Id.* *Accord Videckis v. Pepperdine Univ.*, 150 F.Supp.3d 1151, 1159 (C.D. Cal. 2015) (line "does not exist, save as a lingering and faulty judicial construct"); *Christiansen*, 167 F.Supp.3d at 620 ("no coherent line can be drawn between these two sorts of claims"). The panel's reassurance that plaintiffs face no higher burden of proof for being gay does not resolve that problem.

Because this Court's restrictive interpretation of gender non-conformity/stereotyping claims makes no sense and is nearly impossible to

apply, this Court should grant the petition for rehearing en banc. The Court should then hold that Title VII prohibits discrimination against any plaintiff who fails to conform to stereotypical assumptions of how men and women should behave, including the assumption that men should be attracted only to women and women attracted only to men.

C. The Court's current rule lacks foundation.

Simonton identified two grounds for this Court's rule that sexual orientation discrimination claims are not cognizable under Title VII: an assumption that the word "sex" in Title VII's list of protected characteristics refers only to membership in a class delineated by gender; and Congress's failure to amend the statute to list "sexual orientation." 232 F.3d at 35-36. Neither ground justifies the rule.

On the first point, the word "sex" in Title VII has long been understood to cover more than just men and women. For example, it has been interpreted to include fertile females (*Int'l Union v. Johnson Controls*, 499 U.S. 187, 197 (1991)); mothers with small children (*Back v. Hastings on Hudson Free Sch. Dist.*, 365 F.3d 107, 122 (2d Cir. 2004)); unfeminine women (*Price Waterhouse*, 490 U.S. at 255-58); and transgender individuals (*Smith v. City of Salem*, 378 F.3d 566, 572-73 (6th Cir. 2004)). The other protected characteristics have also been interpreted broadly.

Moreover, the Supreme Court has rejected the notion that Title VII proscribes only the types of discrimination that Congress specifically considered. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-80 (1998) (interpreting ban on sex discrimination to cover same-sex sexual harassment). The Court observed, "statutory prohibitions often go beyond the principal evil [the law was passed to combat] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Id.* at 79-80. As a "reasonably comparable evil," sexual orientation discrimination should be covered by Title VII.

On the second point, "'subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress'" and "'a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns ... a proposal that does not become law.'" Concurrence: 12-13 (citing *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). Bills may fail for all sorts of reasons; Congress's failure to pass any bills addressing sexual orientation shows only that a majority of legislators could not agree on any single version of the provisions. *See* Kate B. Rhodes, *Defending ENDA*, 19 *Law & Sexuality* 1, *8-11 (2010) (describing ENDA's congressional history).

D. This is the appropriate time for en banc review.

Precedent can be overturned when "the rule has proven to be intolerable simply in defying practical workability" or when "facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 854-55 (1992). Such is the case here. While *Simonton* and *Dawson* fell well within the mainstream when they were decided, "the legal landscape has substantially changed." Concurrence: 13. *Lawrence v. Texas*, 539 U.S. 558 (2003), and *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015), now afford greater legal protection to gay, lesbian, and bisexual individuals, and societal understanding of same-sex relationships has also evolved. Additionally, both the Commission and the en banc Seventh Circuit have concluded that Title VII prohibits sexual orientation discrimination. *See Baldwin*, 2015 WL 4397641; *Hively*, 853 F.3d 339.

The question of Title VII coverage for sexual orientation discrimination is a recurring one in this Court and elsewhere. For example, the plaintiff in *Cargian v. Breitling USA*, No. 16-3592 (2d Cir.), has filed a petition for hearing en banc to decide this question. A similar petition is also pending in the Eleventh Circuit. *See Evans v. Ga. Regional Hosp.*, No. 15-152345 (11th Cir. petition filed March 31, 2017).

It is time to stop requiring courts and plaintiffs to perform the "exceptionally difficult task" of distinguishing actionable gender stereotyping from non-actionable sexual orientation claims. Sexual orientation discrimination *is* sex discrimination. This Court should therefore grant rehearing en banc in this and/or *Cargian*, reexamine its precedent, and join the *Hively* Court in holding claims of sexual orientation discrimination cognizable under Title VII.

CONCLUSION

Now is "the appropriate occasion" for the Court to "revisit the central legal issue confronted in *Simonton* and *Dawson*." Concurrence: 2. The Commission asks this Court to grant en banc review and hold that Title VII's ban on sex discrimination includes sexual orientation discrimination.

Respectfully submitted,

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Certificate of Compliance

I certify that the foregoing brief complies with the type-volume limitation of Fed.R.App.P 29(b) because it contains 2599 words from the Statement of Interest through the Conclusion plus the Rule 35(b) Statement of Counsel, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because it has been prepared in a proportional typeface using Microsoft Word 2010 with Times New Roman 14-point font.

/s/ Barbara L. Sloan

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Dated: May 5, 2017

Certificate of Service

I certify that on May 5**,** 2017, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the Court's CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

s/ Barbara L. Sloan
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