

15-3775

**UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda; and
WILLIAM ALLEN MOORE, JR., co-independent executor of the estate of Donald
Zarda,

Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND; and RAY MAYNARD,

Defendants-Appellees.

On Appeal from the U.S. District Court for the Eastern District of New York
Hon. Joseph Bianco, Judge

**BRIEF OF THE NATIONAL EDUCATION ASSOCIATION AS AMICUS
CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae National Education Association (“NEA”) has no parent corporations, does not have shareholders, and does not issue stock.

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY TO FILE

This brief is submitted on behalf of the National Education Association (“NEA”).¹ NEA is the nation’s largest professional association representing over three million members, the vast majority of whom serve as educators, counselors, and education support professionals in our nation’s public schools. All told, nearly three-quarters of the nation’s public school teachers are members of NEA, and women comprise more than 70 percent of NEA members.

NEA recognizes the full dignity and humanity of all students and educators, and stands against discrimination based on race, gender, sexual orientation, gender identity, disability, ethnicity, immigration status, occupation, and religion. NEA believes that a great public school is a fundamental right of every child, and that our schools must be free from intimidation and harassment and safe for all students, including those who identify as gay, lesbian, bisexual, and transgender.

NEA has fought for the rights of women and gay and lesbian educators for decades. NEA had its first female president in 1910, and its first internal gay rights group in 1972, which persists to this day. But even today, our gay and lesbian members face discrimination on the basis of sex. This discrimination not only impacts our gay and lesbian members; it also has a negative impact on our

¹ No party’s counsel authored this brief in whole or in part. No party, party’s counsel, or other person—other than amicus curiae, its members, or its counsel—has contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29(a)(4)(E); 2d Cir. R. 29.1(b).

students, who see their gay teachers harassed or even fired. The narrow sex discrimination doctrine that excludes gay and lesbian teachers has had an impact on male and female teachers as well. NEA is steadfastly committed to eliminating sex discrimination from our schools, for both educators and students.

Amicus files this brief in support of Plaintiffs-Appellants as invited by this Court in its order for rehearing *en banc*. See Order, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017), ECF No. 271; *see also* Fed. R. App. P. 29(b).

SUMMARY OF ARGUMENT

An educator can be married to her wife on Saturday and fired on Monday.² An educator could be named teacher of the year, in part because of his LGBT advocacy and attend a White House ceremony in his honor on Friday, and be fired for his sexual orientation on Monday.³ This is not only morally wrong; it is illegal under Title VII of the Civil Rights Act of 1964.

Amicus writes to make three arguments.

First, sex discrimination as an historical matter has been motivated by a desire

² See, e.g., Max Brantley, *Mount St. Mary Teacher Fired for Marrying Her Female Partner*, Ark. Times (Oct. 17, 2013), <https://www.arktimes.com/ArkansasBlog/archives/2013/10/17/human-rights-campaign-says-mount-st-mary-prepared-to-fire-gay-teacher-for-marrying>.

³ Cf. Avi Selk, *A Teacher's Decision To Be 'Visibly Queer' in His Photo with President Trump*, Wash. Post, June 17, 2017, <https://www.washingtonpost.com/news/education/wp/2017/06/17/a-teachers-decision-to-be-visibly-queer-in-his-photo-with-president-trump>.

to enforce gender norms, and those gender norms have always been bound up with ideas about the proper expressions of human sexuality and sexual orientation. Given that, the exclusion of gays and lesbians from the protection of federal law proscribing sex discrimination has never been justified because sexual orientation discrimination, just like other forms of sex discrimination, is—and always has been—motivated by a desire to enforce gender norms. Sexual orientation discrimination after all is, in the words of the Seventh Circuit, the “ultimate case of failure to conform to [a gender] stereotype”: for those who are motivated to discriminate against gays and lesbians, it is the failure to conform, for example, to the stereotype that men should love and couple with women and not other men that motivates the discrimination. *See Hively v. Ivy Tech Cmty. College*, 853 F.3d 339, 346 (7th Cir. 2017) (en banc).

This Court and others, however, have denied sex discrimination claims brought by gay and lesbian plaintiffs, reasoning that Title VII’s prohibition on sex discrimination reached only discrimination that divided men and women into two groups, perfectly differentiated along biological sex lines. *See Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000) (“Because the term ‘sex’ in Title VII refers only to membership in a class delineated by gender . . . Title VII does not proscribe discrimination because of sexual orientation.”).

To be sure, courts have long been moving away from the notion that sex

discrimination is limited to dividing men and women into two groups. Federal courts now recognize—although they did not always—that sexual harassment discrimination, pregnancy discrimination, and sex stereotyping discrimination are all forms of sex discrimination. *See generally Young v. UPS*, 135 S. Ct. 1338 (2015) (pregnancy discrimination); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (sex stereotyping); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986) (sexual harassment). Yet this Court and others have tried to disentangle and distinguish sexual orientation discrimination from sex stereotyping discrimination, even while acknowledging that such a line is exceedingly difficult to draw. *See Dawson v. Bumble & Bumble*, 398 F.3d 211, 217–23 (2d Cir. 2005) (rejecting a claim premised on gender stereotyping because it sounded too much like sexual orientation discrimination). But in reality, “the line between sex discrimination and sexual orientation discrimination is ‘difficult to draw’ because that line does not exist, save as a lingering and faulty judicial construct.” *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015).

These judicially constructed narrow views of sex discrimination continue to exert considerable influence on sex discrimination law. Those who advance these views often assert that they are putting forth the “traditional” notion of sex discrimination and that those who assert that sexual orientation discrimination is itself a form of sex discrimination are seeking to expand sex discrimination law in

an ahistorical or novel way. As Judge Sykes’s dissent in *Hively* asserts: the “original” meaning of “Title VII’s prohibition of discrimination ‘because of sex’ makes it unlawful for an employer ‘to discriminate against women because they are women and against men because they are men.’” *See* 853 F.3d at 363 (Sykes, J., dissenting) (quoting *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984)); *see generally* Cary Franklin, *Inventing the “Traditional Concept” of Sex Discrimination*, 125 Harv. L. Rev. 1307 (2012).

But, as this brief argues, this narrow version of sex discrimination is neither “traditional” nor rooted in history. This brief shows that *Simonton*, *Dawson*, and decisions like it fail to understand how sex discrimination, even as an historical matter, operates. As an historical matter, the line between sex discrimination and sexual orientation discrimination has never existed. This brief describes sex discrimination as it has existed against one particularly important group—teachers. From the beginning, it was understood that educators had a unique role in reflecting and perpetuating gender norms. Teachers, it has long been thought, both reflect the gender norms of society and have the power to influence the maintenance of such norms.

Because of this, teachers have faced waves of differing forms of sex discrimination—schools have, at various times, forbidden from teaching all women, all married women, all single women, all pregnant women, and all gays

and lesbians. Even straight men have been discriminated against for reasons having to do with gender norms and perceived homosexuality. While sex discrimination in teaching has manifested itself differently over the decades, its motivation has been remarkably consistent: the various regimes of sex discrimination were, and are about, ensuring that teachers reflect and perpetuate certain gender roles and norms, and these roles and norms are inevitably bound up with norms about human sexuality and sexual orientation.

Women were initially excluded from teaching to prevent them from competing with men for finite resources and so they could focus on home and domestic life; women were then allowed into the profession because of the stereotype that they are nurturing by nature; only single women were initially allowed to be teachers because married women had homebound duties; later, single women were not allowed into the profession due to the assumption that single women must be lesbians; gay men were excluded from the profession based on the notion that they would convert boys to become gay and forgo affection for girls; and all male teachers have, at times, been viewed with suspicion because their desire to teach itself may evidence being gay. Sex discrimination in education has never been about the kind of class segregation that *Simonton* envisions nor can it be distinguished from sexual orientation discrimination as *Dawson* envisions.

Second, the failure to recognize that sexual orientation discrimination is sex

discrimination has harmed gay and lesbian educators in profound ways. Sexual orientation discrimination against teachers throughout American history has been particularly rampant, steady, and vicious. And it is long past time for these campaigns of discrimination to stop.

Third and finally, federal courts' failure to uniformly recognize that sexual orientation discrimination is sex discrimination has harmed gay and lesbian students and a ruling concluding that Title VII prohibits sexual orientation discrimination will have a profound and positive impact on gay and lesbian students.

ARGUMENT

I. Throughout American history, sex discrimination against teachers—including and particularly sex discrimination against gay and lesbian teachers—has been motivated by a desire to enforce and perpetuate certain gender norms.

“[S]chools have served as powerfully important institutions for reflecting, creating, enforcing, and restricting the gendered behavior and characteristics of both students and school workers and, by extension, of American culture.” Jackie M. Blount, *Spinsters, Bachelors, and Other Gender Transgressors in School Employment, 1850–1990*, 70 *Rev. Educ. Res.* 83, 85 (2000). Teachers have always been expected to serve as role models for the students they teach, *see* Karen L. Graves, *And They Were Wonderful Teachers* 139–40 (2009); *see also* Karen M. Harbeck, *Gay and Lesbian Educators* 114 (1997), and reflecting particular gender

roles of the day has been just one facet. Teacher contracts have, among other things, forbidden romance and marriage, required the teaching of Sunday school, required teachers to sleep eight hours per night, and restricted theater attendance, dancing, gambling, drinking, and so on. Graves, *supra*, at 126; Harbeck, *supra*, at 20.

“[S]chools,” however, “also have been historically important sites for gender challenges and even rebellion.” Blount, *Spinsters*, *supra*, at 83. Women initially transgressed gender norms simply by becoming teachers. *Id.* at 87. It made remaining unmarried a viable option for many women, allowed women to gain economic independence, and led to the proliferation of housing options for unmarried adult women. Michelle Morgan, “A Touch of Risquity,” in *American Educator in Popular Media* 39–42 (Sevan G. Terzian & Patrick A. Ryan, eds., 2015); Blount, *Spinsters*, *supra*, at 87–88; Jackie M. Blount, *Fit to Teach* 52–54 (2005). Female teachers “challenged a social structure that identified wife and mother as the most appropriate roles for women.” Morgan, *supra*, at 42. And teaching became “a socially sanctioned and highly visible way for women to pursue education, support themselves (admittedly on meager wages), and delay or avoid marriage.” *Id.*

“American public education remains a profoundly gender-polarized profession,” Blount, *Spinsters*, *supra*, at 97, but some of the great battles about

gender roles—both legal and cultural—have been fought in and about the classroom.

A. Women are allowed into teaching

In 1800, 90 percent of the nation’s teachers were male, Dana Goldstein, *The Teacher Wars* 4 (2014), but by 2012, 76 percent were women, Michelle Kahn & Paul C. Gorski, *The Gendered and Heterosexist Evolution of the Teacher Exemplar in the United States*, 18 *Int’l J. Multicultural Educ.* 15, 17 (2016).

Women were initially banned from teaching altogether and the bans were motivated by particular gender ideas of the day: “community leaders believed that women lacked the stature—physical and social—to win or impose the authority and discipline essential to an efficient school,” Michael J. Sedlak, *A History of Teachers and Teaching in America*, in *Encyclopedia of Educational Research* 1369 (M.C. Alkin, ed., 6th ed. 1992), and that women were to remain in the home, focusing on cooking, cleaning, and raising children, Kahn, *supra*, at 18; *see also* Graves, *supra*, at 130.

Women first entered the teaching profession in the early- to mid-nineteenth century as free schools and educational opportunity expanded, increasing the number of schools and thus the demand for teachers. Hazel Davis & Agnes Samuelson, *Women in Education*, 6 *J. Soc. Issues* 25, 25 (1950). By 1850, teaching became considered women’s work. Graves, *supra*, at 129. Teaching was work for

“non-college educated, unmarried, low paid mother substitutes.” Goldstein, *supra*, at 40. The female majority in the teaching profession only accelerated during and after the Civil War. Graves, *supra*, at 129; Suzanne Howard, Nat’l Council of Admin. Women in Educ., *Why Aren’t Women Administering Our Schools?* 5 (1975). By 1920, 86 percent of all teachers were women, and of these, 91 percent were single, widowed, or divorced women. Blount, *Fit, supra* at 59.

Women’s allowance into the profession too was motivated by the gender norms of its day:

- Women were favored based on the stereotype that they were nurturers who could instill values in children, Graves, *supra*, at 125, 129; Sedlak, *supra*, at 1370;
- The schoolhouse was seen as an extension of the private sphere, Graves, *supra*, at 129, and teaching therefore “an extension of women’s domesticity,” Morgan, *supra*, at 39;
- Teaching was viewed as excellent preparation for marriage and motherhood, Blount, *Spinsters, supra*, at 88, although marriage itself was considered incompatible with teaching;
- A female teacher could be paid about a third of a male teacher’s salary, Kahn, *supra*, at 18; *see also* Sedlak, *supra* at 1370; and
- Men were expected to leave the classroom in order to focus on increasing

their, their family's, and the nation's wealth, Graves, *supra*, at 129;

The teaching profession opened up to women in the 1800s, but even then only to a narrow class: single women. This rule, too, was driven by gender norms. Single teachers would not “suffer from dual allegiances to school employers and husbands”—as women, they had to “submit to male authority either in their personal or work lives,” so if they were unmarried, there would be no potential conflict of loyalties. Blount, *Spinsters, supra*, at 87.

The preference for single women led to “marriage bans,” which became popular after World War I. *See generally* David Wilbur Peters, *The Status of the Married Woman Teacher* 85 (1934); *see also* Graves, *supra*, at 132. By 1934, a married woman could not be hired as a teacher in 88 percent of the school systems in the country. Peters, *supra*, at 85. In over 40 percent of school systems that year, a teacher would be fired if she became married while employed. *Id.* There were no laws regarding marriage discrimination in school employment; the majority of school boards had policies prescribing discrimination against married women and the only protections, if any, available for married teachers were provided by tenure laws, which were just becoming widespread throughout the states. *Id.* at 22–23, 34–36.

Why the discrimination against marriage? Here too gender norms motivated the discrimination. At the time, NEA summarized the opposition's arguments as:

- Married teachers cannot give the necessary attention to their home and family if they are working;
- Married teachers do a worse job teaching than single teachers; and
- Single women need a job, as they have no one to provide for them, so those jobs should not go to married women. *Id.* at 51.

Eventually gender norms shifted again and married teachers became preferred to single teachers, although the bans did not fall en masse until the 1960s. Graves, *supra*, at 132. That change was motivated by a growing suspicion of unmarried female teachers: by remaining single, teachers were transgressing gender norms. Blount, *Spinsters, supra*, at 89. Discrimination against single women rose, for many reasons, reasons bound up with gender norms and human sexuality:

- The idea of the “spinster” teacher became synonymous with homosexuality, Kahn, *supra*, at 19;
- It was realized that single women were not abstaining from sex—with either men or women—as previously assumed, *id.* at 65–67;
- Single women were accused of encouraging young girls to evade marriage, Blount, *Fit, supra*, at 2; and
- Claims persisted that an unmarried woman was more prone to nervous breakdowns and bitterness, Kahn, *supra*, at 19.

Although marriage bans lost support much earlier, the Great Depression meant

that dual-income families were disfavored. Blount, *Spinsters, supra*, at 91. Married women were viewed to be in competition with both men and single women for employment. Ilya A. Iussa, *Pregnant Pause*, 15 Scholar 745, 750 (2013). It was not until the end of World War II and its subsequent teacher shortage that there was “an economically compelling reason to permit married women to teach.” Blount, *Spinsters, supra*, at 91. Fewer single women wanted to be teachers—they made more money working in factories during the war, and secretarial and support staff positions opened up even after the men returned home. Blount, *Fit, supra*, at 76. As economic concerns fell away and concerns about promiscuity and homosexuality heightened, married women became preferred for teaching positions over single women. *Id.* at 78.

Discrimination against single women was not the only justification proffered for eliminating marriage bans: stereotypes of marriage and motherhood were invoked. It was said that “marriage and parenthood are likely to enrich a teacher’s understanding of childhood and family life and thus will help her to be a better teacher.” Blount, *Spinsters, supra*, at 90 (internal quotations omitted).

As marriage bans fell, society began to view unmarried teachers as deviant. Graves, *supra*, at 132. The rise of married teachers occurred contemporaneously with the policing of heteronormative behavior by school authorities. *Id.* By 1960, “marriage had come to represent evidence of one’s heterosexuality, and therefore

fitness for service to education.” Blount, *Spinsters*, *supra*, at 95. At least in part because of this discrimination, marriage rates of teachers—both male and female—were notably higher than the marriage rates of employees in the general workforce. *Id.*; *see also* Blount, *Fit*, *supra*, at 78.

B. Pregnancy-based sex discrimination targets teachers

Post-World War II, even prior to the fall of the marriage bans, women who married while teaching often remained teachers. Iussa, *supra*, at 751. However, these married women “were frequently deemed unsuitable to teach while pregnant.” *Id.* An NEA survey in 1948 found that 57 percent of school districts mandated that teachers take maternity leave, “usually starting around the time that pregnancy becomes visible (from about the fourth to sixth month of pregnancy) and lasting well until after childbirth.” *Id.*

Unwed pregnant teachers, in particular, faced discrimination very similar to what gay and lesbian teachers faced. “Like homosexuality, extra-marital sexual behavior is mutable or concealable until a woman becomes visibly pregnant. Becoming visibly pregnant, therefore, is analogous to the act of ‘coming out;’ pregnancy forces private ‘deviant’ behavior into the public sphere.” Rachael Knight, *From Hester Prynne to Crystal Chambers: Unwed Mothers, Authentic Role Models, and Coerced Speech*, 25 Berkeley J. Emp. & Lab. L. 481, 500 (2004). “Like the homosexual who has publicly self-identified, the pregnant

woman has come to personally embody her actions; she is no longer privately having sex, she has become ‘A Pregnant, Unwed Woman.’ Her private actions become her public identity.” *Id.*

Discrimination against pregnant teachers was justified based on the idea that students had to be shielded from this “public” declaration of gender norms and roles. *See, e.g., Hollenbaugh v. Carnegie Free Library*, 436 F. Supp. 1328, 1332 (W.D. Pa. 1977), *aff’d*, 578 F.2d 1374 (3d Cir. 1978) (upholding termination of unwed pregnant librarian). *But see Andrews v. Drew Mun. Separate Sch. Dist.*, 507 F.2d 611 (5th Cir. 1975) (striking down, on Equal Protection and Due Process grounds, school rule that prevented unwed mothers from teaching based on the idea that they were gender role models that students would emulate).

C. Gay and lesbian teachers face pernicious sex discrimination

Discrimination against gay and lesbian teachers has been, from the beginning, motivated by the same type of desire to enforce gender norms against teachers and to prevent teachers from exposing students to gender norms different from the prevailing gender views of the day that justified discrimination against women, single women, married women, and pregnant women. Female teachers, for example, who avoided marriage were purged because it was said that they must be lesbians; whereas men who remained classroom teachers must be gay. *See Blount, Spinsters*, *supra*, at 86, 91.

After World War II, teaching became even more narrowly gendered normative. During the Cold War, teachers were frequently targets of anti-gay discrimination, Graves, *supra*, at 139; Kate Rousmaniere, *Looking at the Man in the Principal's Office*, in *American Education in Popular Media* 204 (Sevan G. Terzian & Patrick A. Ryan, eds., 2015); Blount, *Spinsters*, *supra*, at 92, and the justifications for doing so were explicitly about promoting certain gender norms and prohibiting others.

Gay and lesbian teachers faced scurrilous lies and assertions about their impact on gender norms to justify their oppression. Gay teachers, it was said, had to be purged because:

- “‘Overexposure to feminine norms’ at home and school was turning boys into sissies,” Rousmaniere, *Looking*, *supra*, at 202 (citing Patricia Cayo Sexton, *The Feminized Male* (1969));
- Gay teachers would target children for abuse, Graves, *supra*, at 18–19, and homosexuality was akin to pedophilia, Anthony Niedwiecki, *Save Our Children*, 21 *Duke J. Gender L. & Pol’y* 125, 142–43 (2013);⁴

⁴ Contemporaneous media perpetuated this myth. A 1974 episode of a popular TV show, *Marcus Welby, MD*, featured a story of a gay teacher raping a student. Blount, *Fit*, *supra*, at 4. A popular magazine in the 1950s, *Coronet*, published an article titled “The New Moral Menace to Our Youth,” that told the story of schoolboys engaging in homosexual activity after being “taught” to do so by a teacher. *Id.* at 89–90.

- “[E]ffeminate male teachers . . . ‘carry sex problems into the schools, and transmit abnormal attitudes to their pupils,’” Blount, *Spinsters*, *supra*, at 91 (citing Willard Waller, *The Sociology of Teaching* (1932)); and
- Gay teachers would infect children with, or recruit children to, homosexuality, Graves, *supra*, at 18–19; Rousmaniere, *Looking*, *supra*, at 204; Suzanne E. Eckes & Martha M. McCarthy, *GLBT Teachers: The Evolving Legal Protections*, 45 Am. Educ. Res. J. 530, 531 (2008).

The gender-norm enforcement that harmed gay and lesbian teachers also harmed straight teachers, including straight male teachers. It was thought that gays could be accurately identified by their gender non-conformance; as such, teachers had to “accentuate the gender-appropriateness of their clothing, appearance, and actions.” Blount, *Fit*, *supra*, at 81. Unmarried women, particularly those who had short hair or did not dress in a feminine manner, were at risk for being labeled lesbian and fired. *Id.* at 6.

For much of our history, coaching had been essentially closed to women, because coaching was viewed as a masculine enterprise, and there was a stereotype that female coaches must be lesbians. *See* Rousmaniere, *Looking*, *supra*, at 199; Anne Gregory, *Rethinking Homophobia in Sports: Legal Protections for Gay and Lesbian Athletes and Coaches*, 1 DePaul J. Sports L. & Contemp. Probs. 264, 272–73 (2004) (“Accusations that playing sports ‘masculinizes’ women, or that female

coaches or athletic personnel are lesbians, serve[] to discredit women regardless of actual sexual orientation so that men can ‘retain their higher status and control of resources.’”) (internal citations omitted). Title IX of the Education Amendments of 1972 expanded opportunity for female athletes, but it did less for female coaches, largely because of widespread homophobia.⁵

Male teachers, including straight male teachers, also found themselves in a tough position: there was a stereotype that men who were classroom teachers were effeminate, and effeminate men were stereotyped as gay. Blount, *Spinsters*, *supra*, 86, 91; Jackie M. Blount, *W.W.II and the Great Gender Realignment of School Administration* 10–11 (1999). Fears of young boys growing up to be weak and of gay men corrupting students brought about a campaign to recruit heterosexual men into the schools; these men were promised administrative positions. Blount, *Spinsters*, *supra*, at 86, 92. Contemporaneous job advertisements for school administrators called for heterosexual, married men without effeminate qualities. Kate Rousmaniere, *The Principal’s Office* 99 (2013). The position of principal was

⁵ See Kate Fagan & Luke Cyphers, *The Glass Wall*, ESPN.com, <http://www.espn.com/espn/eticket/story?page=theGlassWall> (last accessed June 26, 2017) (“Homophobia has haunted women’s sports throughout the Title IX era, forcing coaches to stay closeted for fear of losing their jobs, or at least recruits. In some quarters, coaches have been known to signal quietly to prospects or their parents that a competing program is run by a lesbian, in an effort to turn the recruit away.”); *cf. Weaver v. Nebo Sch. Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (finding unconstitutional the termination of a female volleyball coach due to her sexual orientation).

masculinized by physically separating administration from female teachers, requiring specialized credentialing, consolidating small schools that may have had women principals with larger schools, and tapping athletic coaches for principle positions. Rousmaniere, *Looking, supra*, at 196–99. Even today, men who work in female-identified positions, such as elementary school teacher, are often accused of being gay. *See, e.g.*, Rebecca Priegert Coulter & Margaret McNay, *Exploring Men’s Experiences as Elementary School Teachers*, 18 Can. J. Educ. 398, 403–04 (1993); Susan Donaldson James, *Why Men Don’t Teach Elementary School*, ABC News (Mar. 25, 2013), <http://abcnews.go.com/Health/men-teach-elementary-school/story?id=18784172>.

The fear of gay and lesbian teachers “drove conventional gender-identified roles in schoolwork to polar extremes,” Blount, *W.W.II., supra*, at 12, and its impact still reverberates today.

II. Gay and lesbian teachers, in particular, have suffered great harm as a result of sex discrimination in school employment.

Sexual orientation discrimination did not just shape the gendered expectations of the teaching profession; it also caused widespread harm to teachers.

There is a long history of gay and lesbian educators remaining closeted in order to keep their jobs. *See generally* Blount, *Fit, supra*. During the Cold War, teachers were frequently fired for mere rumors of homosexuality. Blount, *Spinsters, supra*, at 92–95; Harbeck, *supra*, at 187. As one historian put it, “Quite probably, the

occupational group most harmed [by anti-gay campaigns during the Cold War] w[ere] lesbian and gay educators.” Harbeck, *supra*, at 187.

Post-war America witnessed numerous campaigns of discrimination directed at gay and lesbian educators. These campaigns were justified for the explicit reason that gays and lesbians deviated from accepted gender norms and may influence how students view their own gender expression. For example, between 1957 and 1963, the Florida Legislative Investigative Committee focused with great public fanfare on investigating and firing gay and lesbian teachers. Graves, *supra*, at 10. The State Superintendent proclaimed that “[t]he presence of even one homosexual teacher in our schools is not to be tolerated.” *Id.* at 98. The Committee claimed that “[p]ractic[ing] homosexuals . . . recruit[] young people as sex partners . . . [and a] homosexual teacher . . . can and does do tremendous damage to quite a large group of children.” *Id.* at 106–07. More than 100 teachers were fired during those six years. Amanda Machado, *The Plight of Being a Gay Teacher*, *The Atlantic* (Dec. 16, 2014), <https://www.theatlantic.com/education/archive/2014/12/the-plight-of-being-a-lgbt-teacher/383619/>.

In late 1970s Miami, an anti-discrimination ordinance that would have protected gays and lesbians in housing and some employment was defeated by a so-called Save Our Children movement. Blount, *Spinsters*, *supra*, at 96. Save Our Children’s opposition to the anti-discrimination ordinance “included pictures of

newspaper clippings detailing stories of teachers and gay men arrested for having sex with children,” Niedwiecki, *supra*, at 146, fanning parental concerns that cross-dressing, flamboyant gay men were entering the teaching profession because they were attracted to young boys, Harbeck, *supra*, at 44. Parents were told that anti-discrimination laws would force teachers to teach children that being gay was an alternative lifestyle they were welcome to explore. *Id.* at 56.

In late 1970s California, an initiative to permit schools to fire gay and lesbian teachers gained national attention, but was defeated. Blount, *Spinsters, supra*, at 96. The sponsor of this initiative, Senator Briggs, argued that firing gay and lesbian teachers was necessary to prevent alterations in generally accepted gender norms.

A teacher who is a known homosexual will automatically represent that way of life to young, impressionable students at a time when they are struggling with their own critical choice of sexual orientation. When children are constantly exposed to such homosexual role models, they may well be inclined to experiment with a life-style that could lead to disaster for themselves and ultimately for society as a whole.

Niedwiecki, *supra*, at 151–52 (citing Dudley Clendinen & Adam Nagourney, *Out for Good* 381 (1999), quoting a contemporaneous Los Angeles Times column).

Oklahoma, however, successfully passed a virtually identical bill in the late 1970s, which was upheld in-part by the Tenth Circuit: according to the Tenth Circuit then, public LGBTQ advocacy was an unconstitutional ground for teacher dismissal, but specific gay acts were acceptable grounds for dismissal. *The Nat’l*

Gay Task Force v. Bd. of Educ. of Okla. City, 729 F.2d 1270 (10th Cir. 1984), *aff'd by an equally divided Court*, 470 U.S. 903 (1985).

In the early 1990s, Oregon attempted to pass Ballot Measure 9, which would require public schools to “assist in setting a standard for Oregon's youth that recognizes homosexuality, pedophilia, sadism and masochism as abnormal, wrong, unnatural, and perverse and that these behaviors are to be discouraged and avoided.” Timothy Egan, *Oregon Measure Asks State to Repress Homosexuality*, N.Y. Times (Aug. 16, 1992), <https://goo.gl/fKFhZ2>. Forty-four percent voted for it. Or. Blue Book, *Initiative, Referendum and Recall: 1988-1995* (2017), <http://bluebook.state.or.us/state/elections/elections21.htm>. In 1992, Colorado passed Amendment 2, which repealed anti-discrimination protections for gays and lesbians in Denver, Boulder, and Aspen and prohibited local governments, including school districts, from ever again enacting anti-discrimination provisions that would protect gays and lesbians—the amendment was eventually struck down by the Supreme Court. *See Romer v. Evans*, 517 U.S. 620 (1996).

Even today, gay and lesbian teachers are fired from schools and face workplace harassment.⁶ One survey notes that in 2008, 86 percent of gay and lesbian teachers

⁶ *See, e.g.*, Amanda Terkel, *Gay Teacher Fired After Posting Marriage Announcement on Facebook*, HuffPost (Jan. 14, 2015), http://www.huffingtonpost.com/2015/01/14/lonnie-billiard_n_6472566.html; Kate Abbey-Lambertz, *Supporters Rally for Lesbian Teacher Who Was Fired After Getting Pregnant*, HuffPost (Sept. 8, 2014),

heard homophobic comments in schools; 35 percent feared they would lose their job if they were outed to an administrator; and 53 percent feared they would lose their job if they were outed to students. Nancy J. Smith et al., *A National Study of LGBT Educators' Perceptions of Their Workplace Climate* 14–15 (2008).

Even recent Supreme Court justices have welcomed the idea that discrimination against gay and lesbian educators is acceptable precisely because gays and lesbians deviate from certain gender norms and because of the fear that gay and lesbian teachers would influence negatively the gender norms of their students. During oral arguments in *Lawrence v. Texas*, the case that ultimately struck down criminal sodomy laws, “Chief Justice Rehnquist asked an attorney arguing on behalf of Lawrence if it would be unconstitutional to deny the right of gay people to teach kindergarten. Justice Scalia interjected, ‘Well, the reason would be they don’t want them to lead children down the path of homosexuality.’” Eckes, *GLBT Teachers*, *supra*, at 531. Justice Scalia’s dissent noted that “[m]any Americans do not want

http://www.huffingtonpost.com/2014/09/08/barb-webb-gay-fired-marian_n_5784450.html; Beau Yarbrough, *Lesbian Teacher Says She Was Fired for Helping LGBT Students*, HuffPost (Nov. 20, 2013), http://www.huffingtonpost.com/2013/11/20/lesbian-teacher-fired-lgbt_n_4309312.html; Meredith Bennett-Smith, *Carla Hale, Gay Teacher, Fired from Catholic High School After Being ‘Outed’ By Mother’s Obituary*, HuffPost (Apr. 18, 2013), http://www.huffingtonpost.com/2013/04/18/carla-hale-gay-fired-teacher-catholic-high-school_n_3103853.html; Catherine Gewertz, *Fired Beverly Hills Superintendent Claims Anti-Gay Bias*, Educ. Week (Mar. 8, 2000), <http://www.edweek.org/ew/articles/2000/03/08/26gay.h19.html>; Kahn, *supra*, at 16 (in 1997, parents in Utah lobbied to have the teaching license of a lesbian teacher revoked because they claimed she could not be a positive role model).

persons who openly engage in homosexual conduct . . . as teachers in their children's schools[.]” *Lawrence v. Texas*, 539 U.S. 558, 602 (2003).

From the gay scares of the 1950s through Justice Scalia’s utterances, it has been clear that discrimination against gay and lesbian teachers has always been premised on their deviation from accepted gender norms.

III. Gay and lesbian students would benefit from a ruling in Zarda’s favor and would be harmed by a contrary ruling.

Ruling that Title VII prohibits sexual orientation discrimination will not just protect gay and lesbian teachers; it will protect gay and lesbian students as well. Title VII and Title IX of the Education Amendments of 1972’s prohibitions on sex discrimination are construed similarly. *See, e.g., Cannon v. Univ. of Chi.*, 441 U.S. 677, 694–98 (1979). If the panel’s ruling is upheld, gay and lesbian students could be deprived of Title IX protections, contravening the view of many other courts.⁷

Yet Title IX’s protections are more important than ever for students: the Trump Administration recently rescinded its Title IX transgender guidance and reversed LGBT-targeted enforcement activities, suggesting at the very least, that in its view, schools are free to discriminate against students for just being gay, lesbian, or

⁷ *See Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, No. 16-3522, 2017 WL 2331751, at *8–11, ___ F. 3d ___ (7th Cir. May 30, 2017); *Bd. of Educ. of Highland Local Sch. Dist. v. U.S. Dep’t of Educ.*, 208 F. Supp. 3d 850, 865–71 (S.D. Ohio 2016), *appeal docketed*, No. 16-4117 (6th Cir. Sept. 28, 2016); *Carcaño v. McCrory*, 203 F. Supp. 3d 615, 632–39 (M.D.N.C. 2016); *Videckis*, 150 F. Supp. 3d at 1159–60.

transgender. *See* Civil Rights Div., U.S. Dep’t of Justice & Office for Civil Rights, U.S. Dep’t of Educ., Dear Colleague Letter (Feb. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf>; *cf.* Emma Brown, *Education Dept. Closes Transgender Student Cases As It Pushes to Scale Back Civil Rights Investigations*, Wash. Post (June 17, 2017), <https://goo.gl/BJ4Tf7>.

This is unacceptable. Gay and lesbian students need the protection of federal law. Nearly 60 percent of gay and lesbian students feel unsafe at school because of their sexual orientation; 85 percent report they have been verbally harassed; 60 percent report they have been sexually harassed; 27 percent report they have been physically harassed; and 13 percent report they have been physically assaulted. Joseph G. Kosciw et al., GLSEN, *The 2015 National School Climate Survey 22–24* (2016). Harassed and bullied students have lower grades, higher absenteeism, higher rates of depression, and are less likely to attend college. *Id.* at 41.

Discrimination against gay and lesbian students not only harms them but it harms all students by degrading the overall school climate. School climate—that is, the “product of the interpersonal relationships among students, families, teachers, support staff and administrators” that sets the “norms, values, and expectations that support people feeling socially, emotionally, and physically safe” in school—is a key predictor of student engagement, student mental and physical health, and

academic achievement, and is positively correlated with decreased absenteeism, dropout rates, and suspensions.⁸

Discrimination against gay and lesbian teachers also harms gay and lesbian students. The role teachers play in supporting gay, lesbian, and transgender students cannot be overstated. *See, e.g.,* Taica Hsu, *How I Support LGBTQ+ Students at My School*, *Am. Educator*, Winter 2016–2017, at 20–22, <https://goo.gl/VW7gGM>. When students have the support of both their teachers and peers, they have higher academic, emotional, and social success. Paul D. Flaspohler et al., *Stand By Me: The Effects of Peer and Teacher Support in Mitigating The Impact of Bullying on Quality of Life*, 6 *Psych. in Schs.* 636, 639, 645–46 (2009). And in schools that have Gay-Straight Alliances, which provide a safe space for LGBTQ students and their allies, LGBTQ students are subject to less harassment and feel more safe in school. Kosciw, *supra*, at 62–63.

Gay and lesbian teachers in particular are able to provide key emotional support

⁸ *See* Nat'l Sch. Climate Ctr., *School Climate Research Summary 2–3* (August 2012), <https://www.schoolclimate.org/climate/documents/policy/sc-brief-v3.pdf>; Nat'l Educ. Ass'n, *Research Brief: Importance of School Climate 1* (2013), https://www.nea.org/assets/docs/15584_Bully_Free_Research_Brief-4pg.pdf; Nat'l Sch. Climate Ctr., *The School Climate Challenge 5* (2007), <https://www.schoolclimate.org/climate/documents/policy/school-climate-challenge-web.pdf>; David Osher et al., *Improving Academic Achievement Through Improving School Climate and Student Connectedness* (Apr. 14, 2009), <https://goo.gl/4nCGPJ>; Adam Voight, Gregory Austin & Thomas Hanson, *A Climate for Academic Success* (2013), <http://files.eric.ed.gov/fulltext/ED559741.pdf>.

to gay students. *See generally* Katherine van Wormer & Robin McKinney, *What Schools Can Do to Help Gay/Lesbian/Bisexual Youth: A Harm Reduction Approach*, 38 *Adolescence* 409 (2003); Corrine Muñoz-Plaza, Sandra Crouse Quinn & Kathleen A. Rounds, *Lesbian, Gay, Bisexual and Transgender Students: Perceived Social Support in the High School Environment*, 85 *High Sch. J.* 52 (2002). But all too often, gay and lesbian teachers do not feel safe intervening in cases of sexual harassment or discrimination. *See generally* Elizabeth J. Meyer, *Gendered Harassment in Secondary Schools*, 20 *J. Gender & Educ.* 555 (2008); *see also* Machado, *supra*. Gay and lesbian teachers still fear that they will lose their jobs if they are outed. Smith, *supra*, at 14–15; Human Rights Watch, “*Like Walking Through a Hailstorm*” 3, 10 (Dec. 7, 2016), https://www.hrw.org/sites/default/files/report_pdf/uslgbt1216web_2.pdf. And when gay and lesbian students see that their gay and lesbian teachers are closeted or are terminated or harassed for being gay, the message of stigmatization that that sends to gay and lesbian students is unmistakable. Kahn, *supra*, at 23–24; *see also* Todd A. DeMitchell, Suzanne Eckes & Richard Fossey, *Sexual Orientation and the Public School Teacher*, 19 *B.U. Pub. Int. L.J.* 65, 104–05 (2009).

CONCLUSION

For the foregoing reasons, Amicus urges this Court to overrule *Simonton* and its progeny and conclude that sexual orientation discrimination is a form of sex

discrimination under Title VII.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Local Rules 29.1(c) and 32(a)(4)(A) because it contains 6,289 from the Introduction and Statement of Interest through the Conclusion, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word with Times New Roman 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

/s/ Eric A. Harrington

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