No. 16-2424

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL OPPORTUNITY EMPLOYMENT COMMISSION,

Plaintiff-Appellant,

and

AIMEE STEPHENS,

Intervenor,

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of Michigan
Civil Case No. 2:14-cv-13710 (Honorable Sean F. Cox)

R.G. & G.R. HARRIS FUNERAL HOMES, INC.'S RESPONSE TO MOTION OF INTERVENOR AIMEE STEPHENS FOR LEAVE TO PARTICIPATE IN ORAL ARGUMENT

This Court granted Intervenor Aimee Stephens's motion to intervene with respect to briefing only, Order, ECF No. 28-2, yet Stephens now moves this Court for permission to participate in oral argument. Stephens's participation in oral argument is unnecessary: Stephens's interests are adequately represented by the Equal Employment Opportunity Commission ("EEOC"), and with appellate briefing concluded, it is clear that Stephens's arguments are duplicative. Consequently, Appellee R.G. & G.R. Harris Funeral Homes, Inc. ("R.G."), respectfully requests that this Court deny Stephens's motion for leave to participate in oral argument.

This Court granted Stephens's motion to intervene in response to Stephen's speculation that the EEOC may not adequately protect Stephens's interests going forward. But that has proven not to be the case. The EEOC has filed two briefs in this case vigorously asserting all possible legal arguments. Moreover, the EEOC has not scaled back its transgender-related litigation efforts under Title VII in any way, as expressly laid out in its Strategic Enforcement Plan for fiscal years 2017 through 2021, which states that "[p]rotecting lesbians, gay men, bisexuals and transgender (LGBT) people from discrimination based on sex" as a "substantive area priority." U.S. Equal Employment Opportunity Commission, Strategic Enforcement Plan, Fiscal Years 2017-2021, https://www.eeoc.gov/eeoc/plan/sep-2017.cfm (last visited Aug. 21, 2017).

Importantly, the EEOC recently demonstrated its commitment to this Strategic Enforcement Plan priority by commencing a new lawsuit. Just two months ago, the EEOC filed a lawsuit in the Southern District of New York alleging that an employee of an Applebee's Neighborhood Bar and Grill franchisee in the New York City area was harassed because of the employee's transgender status and terminated for objecting to the alleged harassment. Press Release, EEOC, *EEOC Sues Apple Metro Restaurant Chain for Sex Discrimination & Retaliation*, (June 9, 2017), https://www.eeoc.gov/eeoc/newsroom/release/6-9-17.cfm (last visited Aug. 21, 2017). In the lawsuit, the EEOC contends that harassment based on transgender status constitutes discrimination based on sex in violation of Title VII. *See* Complaint at 17-18, *EEOC v. Apple-Metro, Inc.*, No. 17-cv-4333, (S.D.N.Y June 8, 2017). Despite the change of Presidential Administrations, the EEOC has thus continued its constitutionally questionable "push[] to expand the interpretation of Title VII's probation against discrimination on the basis of 'sex' to protect LGBTQ individuals." Katherine Bromberg, *EEOC Files Gender Identity Lawsuit in SDNY*, Huffington Post (June 22, 2017), http://bit.ly/2fY31mg (last visited Aug. 21, 2017).

The EEOC also asserted the same position in *Zarda v. Altitude Express*, in which the Second Circuit recently agreed to review *en banc* the panel decision in *Zarda*, which had held that Title VII's prohibition of discrimination based on sex did not encompass discrimination based on sexual orientation. *Zarda v. Altitude*

Express, 855 F.3d 76 (2d. Cir. 2017) (per curiam). In June, the EEOC opposed that view by filing an amicus curiae brief, arguing that sexual-orientation-discrimination status claims fall squarely within Title VII. *See* En Banc Brief of Amicus Curiae Equal Employment Opportunity Commission in Support of Plaintiffs/Appellants and In Favor of Reversal, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d. Cir. June 23, 2017) (attached hereto as Exhibit 1). Among other things, the EEOC's brief argues that sexual-orientation discrimination is covered by Title VII because it "necessarily involves impermissible sex stereotyping." *Id.* at 5. It is thus evident that the EEOC's push to expand Title VII's prohibition on sex discrimination to include discrimination based on LGBT status—a strategic effort commenced in 2012, *see Bromberg*, *supra*—shows no signs of abating.

Significantly, the Department of Justice filed an amicus brief in *Zarda* opposing the EEOC. *See* Brief for the United States as Amicus Curiae, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d. Cir. July 26, 2017) (attached hereto as Exhibit 2). In its brief, the Department of Justice argues that "Title VII does not proscribe employment practices that take account of the sex of employees but do not impose differential burdens on similarly situated members of each sex." *Id*. at 5. The Department further argues that "when Congress prohibited sex discrimination, it did not also prohibit sexual orientation discrimination," an interpretation that "Congress has clearly ratified . . . in repeated and varied ways." *Id.* at 6. The position of the

Department of Justice thus squarely opposes the position that the EEOC takes in its amicus brief, demonstrating the relative independence of the EEOC within the executive branch. Indeed, the Department of Justice notes that "the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade." *Id.* at 1.

This also demonstrates the independence of the EEOC: it is a bipartisan Commission which is not under the direct authority of the President. Indeed, of the four sitting Commissioners, Ms. Feldblum, Ms. Yang, and Ms. Burrows were all appointed by then-President Obama. This independence of the EEOC thus largely insulates it from the change of Presidential administrations, and given the concrete actions cited above, it cannot be seriously argued that the EEOC is going to change course in between now and October 4th, when oral argument is scheduled in this case.

On the contrary, in light of the EEOC's recent litigation activities and its expressly stated strategic priority to expand the scope of Title VII, there can be no doubt that the EEOC will adequately represent Stephens's interests at oral argument. And, contrary to Stephens's contentions, the fact that this case is of national significance simply has no bearing on the question of the EEOC's ability to provide adequate oral argumentation. Nor does it mean that one side should get two bites at the oral-argument apple.

Finally, reviewing the briefs in this case reveals that Stephens's and the EEOC's arguments are almost entirely duplicative. Stephens's brief raises only one legal issue that differs significantly from those raised by the EEOC, and that issue is an impermissibly new and prejudicial one—namely, Stephens argues that the Religious Freedom Restoration Act does not apply against a private party in a Title VII action. As discussed in R.G.'s principal brief, *see* R.G. Resp. Br. 42-43, ECF No. 66, that issue was never raised or briefed by the parties at the District Court level, and permitting Stephens to argue it now would unfairly prejudice Appellee. Indeed, this Court's order granting Stephens's motion to intervene was premised on the assurance that Stephens would not raise entirely new issues. Order 2, ECF No. 28-2, (explaining that R.G. would "not be prejudiced, [by Stephens's intervention] given Stephens's concession in her reply that she does not intend to raise new issues."). To raise the issue properly, Stephens would have had to intervene at the District Court level. But Stephens failed to do so, instead waiting to intervene until after this appeal commenced. As the only point that Stephens argues not raised by the EEOC is foreclosed by not being properly raised in the court below, Stephens' arguments would be duplicative to those of the EEOC.

For all of the foregoing reasons, this Court should deny Stephens's motion for leave to participate in oral argument.

Dated this 22nd day of August, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2017, I filed the foregoing document, entitled Response to Motion of Intervenor Aimee Stephens For Leave to Participate in Oral Argument, through the Court's ECF system, which will effectuate service on all parties.

s/ Douglas G. Wardlow
Douglas G. Wardlow
Counsel for Defendant-Appellee

EXHIBIT 1

No. 15-3775

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MELISSA ZARDA and WILLIAM ALLEN MOORE, JR., co-independent executors of the estate of Donald Zarda,
Plaintiffs/Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as SKYDIVE LONG ISLAND; and RAY MAYNARD,
Defendants/Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

EN BANC BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN FAVOR OF REVERSAL

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC" or "Commission") is the primary agency charged by Congress with interpreting and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal addresses whether claims of sexual orientation discrimination are cognizable under Title VII as claims of sex discrimination. Because such claims necessarily involve impermissible consideration of a plaintiff's sex, gender-based associational discrimination, and sex stereotyping, the EEOC believes they fall squarely within Title VII's prohibition against discrimination on the basis of sex. In furtherance of its strong interest in the interpretation of the federal anti-discrimination employment laws, and in response to the invitation in this Court's Order of May 31, 2017, the EEOC offers its views to the Court. Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE

Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination "because of … sex"?

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff Donald Zarda worked for Defendant Altitude Express as a skydiving instructor.[1] Following one jump, a customer complained that Zarda had disclosed his homosexuality and other personal details during the jump. Zarda was fired soon thereafter. He sued Altitude Express claiming sex discrimination under Title VII, gender and sexual orientation discrimination under New York state law, and violation of state and federal wage and hour laws.

B. District Court and Circuit Court Decisions

The district court granted summary judgment to Altitude Express on Zarda's Title VII claim, finding no evidence that his termination was connected to his failure to conform to a masculine stereotype. At the same time, the district court found sufficient evidence of sexual orientation discrimination to allow Zarda's state law discrimination claim to go forward. Zarda sought reconsideration of the denial of his Title VII claim based on the newly decided *Baldwin v. Foxx,* EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015), an EEOC administrative decision holding that sexual orientation discrimination violates Title VII. The district court denied the motion, concluding it was bound by *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which held that Title VII does not prohibit discrimination based on sexual

[1] Zarda is deceased. Two executors of his estate have replaced him as plaintiff.

orientation. At trial on his state law discrimination claim, the jury found that Zarda had not proved that his sexual orientation was a determining factor in his termination.

On appeal, Zarda challenged the dismissal of his Title VII claim under *Simonton* but did not challenge the court's ruling that he had failed to establish a connection between his termination and his failure to conform to gender stereotypes in appearance or behavior. Thus, he limited his appeal to the question whether *Simonton* precludes claims of sexual orientation discrimination under Title VII.[2] A panel of this Court affirmed the district court's ruling, holding that "Zarda may receive a new trial only if Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation – a result foreclosed by *Simonton*." Slip op. at 8. This Court also held that the jury's finding on Zarda's state law sexual orientation claim did not moot the Title VII issue because a sexual orientation discrimination claim under New York state law is subject to a "but-for causation" standard of proof, which is higher than the "motivating factor" standard attaching to Title VII claims. *Id.* at 7. Thus, this Court concluded, "if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial." *Id.* In its May 25, 2017 Order, this Court granted en banc rehearing limited to the issue whether Title VII's prohibition of discrimination "because of … sex" encompasses discrimination on the basis of sexual orientation.

[2] Zarda also appealed several other rulings relating to the trial. He does not seek en banc review of these rulings.

ARGUMENT

Title VII prohibits employers from discriminating against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). This Court concluded seventeen years ago that "Title VII does not prohibit harassment or discrimination because of sexual orientation." *Simonton*, 232 F.3d at 35; *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-218 (2d Cir. 2005). In the years since this Court decided *Simonton* and *Dawson*, however, the EEOC and an increasing number of courts (including, most recently, the Seventh Circuit sitting en banc) have analyzed the issue and come to the opposite conclusion. In doing so, they have repeatedly focused on three arguments about sexual orientation discrimination, none of which was addressed in *Simonton* or *Dawson*: that such discrimination (1) involves impermissible sex-based considerations, (2) constitutes gender-based associational discrimination, and (3) relies on sex stereotyping. For each of these reasons, sexual orientation discrimination *is* sex discrimination, and sex discrimination violates Title VII. *See Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 207 (2d Cir. 2017) (Katzmann, C.J., concurring) (summarizing these theories and noting that "[n]either *Simonton* nor *Dawson* had occasion to consider these worthy approaches").

Several additional reasons warrant overruling *Simonton* and its progeny. First, the primary authorities on which that case relied are no longer followed. Second, as many courts have concluded, the line this Court drew in *Simonton* and *Dawson* between sexual orientation discrimination and discrimination based on sex stereotypes is

unworkable and leads to absurd results. Thus, both precedent and practicality dictate overruling *Simonton*.

I. Sexual Orientation Discrimination is Discrimination "Because of … Sex" Under Title VII.

As Chief Judge Katzmann's *Christiansen* concurrence noted, this Court did not have the benefit of three key arguments when it first addressed whether Title VII's prohibition on sex-based discrimination includes a prohibition on sexual orientation discrimination. *Christiansen*, 852 F.3d at 202, 206-07 (Katzmann, C.J., concurring). Those three arguments – that sexual orientation discrimination treats otherwise similarly situated people differently solely because of their sex, constitutes associational discrimination, and necessarily involves impermissible sex stereotyping, all in violation of Title VII – lead inexorably to the conclusion that discrimination because of sexual orientation cannot rationally be distinguished from discrimination because of sex.

Sexual orientation discrimination is, by definition, discrimination "because of … sex," in violation of Title VII.

In passing Title VII, Congress made the "simple but momentous announcement" that sex, like other protected characteristics, is "not relevant" to employment decisions; thus, in making such decisions, employers "may not take gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 242 (1989). If an employer treats an employee less favorably than it would treat a comparable employee who, aside from his or her sex, is identical in all respects (including, for example, the

sex of that employee's spouse), the employer discriminates against the employee "because of sex." *See L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (employing "the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different" to determine whether a sex-based violation of Title VII occurred (internal citation and quotation marks omitted)); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983) (applying *Manhart*'s "simple test of Title VII discrimination"); *Baldwin*, 2015 WL 4397641, at *5 (noting that an employer who fires a lesbian employee but not a male employee for displaying a photo of a female spouse at work would violate Title VII under *Manhart* by impermissibly taking the employee's sex into account).

Several courts have already applied *Manhart*'s "simple test" to hold that sexual orientation discrimination constitutes discrimination because of sex. The Seventh Circuit en banc court posed the counterfactual scenario of "a situation in which [the plaintiff] is a man, but everything else stays the same: in particular, the sex or gender of the partner." *Hively v. Ivy Tech Community Coll.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc). To the extent no discrimination would have occurred in this alternate scenario, the court concluded, "[t]his describes paradigmatic sex discrimination." *Id.* (holding that sexual orientation discrimination therefore violates Title VII). In *Hall v. BNSF Railway Co.*, similarly, the court held that a plaintiff, a man married to another man, successfully alleged sex discrimination under Title VII when he was denied a spousal health benefit available to similarly situated women married to men. No. C13-2160,

2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014). The court in *Heller v. Columbia Edgewater Country Club* explained that a woman claiming sexual harassment could prove her claim if she could show that her manager would have treated her differently if she were a man dating a woman instead of a woman dating a woman. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002). In *Videckis v. Pepperdine University*, the court explained, "If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment," and therefore concluded that they "have stated a straightforward claim of sex discrimination." *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015).[3]

Each of these cases recognizes the same principle: sexual orientation discrimination requires the employer to take the employee's sex into account (in conjunction with the sex of that employee's actual or desired partner). *See Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("Fundamental to the definition of homosexuality is the sexual attraction to individuals of the 'same sex.' … One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless."); *Boutillier*, 221 F. Supp. 3d at 267 (noting that sexual orientation discrimination necessarily requires a consideration of the sex of the individual, as well as that of the partner). In short, an employer cannot discriminate

[3] *Videckis* is a Title IX case, but the court stressed that the same analysis applies to claims under Title IX and Title VII. *Videckis*, 150 F. Supp. 3d at 1158.

against an employee based on that employee's sexual orientation without taking the employee's sex into account – precisely what Title VII forbids. *Price Waterhouse*, 490 U.S. at 242.

Under this analysis, it is irrelevant that an employer discriminating on the basis of sexual orientation does not discriminate against *all* men or women, but only against those who are gay or lesbian. Title VII has never required an employer to discriminate against all employees in a protected class before recognizing an individual employee's claim. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of … sex merely because [it] favorably treats other members of the employees' group."); *Hively*, 853 F.3d at 346 n.3 ("A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex."); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (holding that a valid claim of gender discrimination does not require discrimination against all members of a disfavored class).

In her *Hively* dissent, Judge Sykes disagreed with the en banc majority's application of *Manhart*. She argued instead that the valid comparison in the sexual orientation context requires comparing the treatment of gay men to that of lesbians, rather than comparing a heterosexual man to a lesbian, or a gay man to a heterosexual woman. *See, e.g.*, *Hively*, 853 F.3d at 366 (Sykes, J., dissenting) ("If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an

actual case of sex discrimination."). But such an argument distorts *Manhart*'s "simple test." *Manhart*, 435 U.S. at 711. Rather than simultaneously changing both the plaintiff's (a) sex and (b) sexual orientation to create a hypothetical comparator, as Judge Sykes proposed, *Manhart* instead requires that the court change only the protected characteristic being analyzed – the plaintiff's sex. *See Hively*, 853 F.3d at 345 ("The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once."). Adopting Judge Sykes's approach strays from the simple *Manhart* approach by changing two variables; this "would no longer be a 'but-for-the-sex-of-the-plaintiff' test." *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring); *cf. Loving v. Virginia*, 388 U.S. 1, 7-8 (1967) (rejecting the argument in the Equal Protection Clause context that anti-miscegenation laws did not discriminate between races because it restricted members of both races equally from engaging in interracial relationships). In *Price Waterhouse*, the Supreme Court did not examine whether the plaintiff was treated differently from a comparable male perceived as insufficiently masculine. Instead, the Court asked, simply, whether she was treated differently *because of her sex*. *Price Waterhouse*, 490 U.S. at 241; *see also Hively*, 853 F.3d at 359 (Flaum, J., concurring) ("So if discriminating against an employee because she is homosexual is equivalent to discriminating against her because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex. That is all an employee must show to successfully allege a

Title VII claim."). Sex alone is the key factor guiding the inquiry; "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine." *Nichols*, 256 F.3d at 874.

Sexual orientation discrimination constitutes associational discrimination that violates Title VII.

Sexual orientation discrimination also violates Title VII's prohibition against sex discrimination because it treats individuals differently based on the sex of those with whom they associate. Just as discrimination against individuals based on the race of their partners and friends constitutes a violation of Title VII, discrimination based on the sex of those with whom an individual associates similarly violates the statute. Such associational discrimination necessarily, and illegally, takes into account the employee's sex, in violation of Title VII. *See Price Waterhouse*, 490 U.S. at 243.

This Court recognized that associational discrimination violates Title VII. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), decided eight years after *Simonton*, a white assistant college basketball coach alleged he had been terminated because he married a black woman. This Court held that he had established a prima face case of race discrimination, explaining that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 132. The holding did not depend on a theory of third-party injury; to the contrary, this Court explained, "where an employee is subjected to

adverse action because an employer disapproves of interracial association, the employee suffers discrimination because of the employee's *own* race." *Id.* at 139.

A panoply of cases from other circuits, involving a range of interracial associational relationships, have likewise concluded that such claims for association-based discrimination are cognizable under Title VII. *See, e.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (interracial marriage); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (interracial dating), *vacated in part on other grounds in Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (having a biracial child); *Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 n.6 (8th Cir. 1994) (interracial working relationship); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (interracial teacher-student friendship); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships or associations among coworkers).

As the Seventh Circuit recently explained, "[t]he fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses …." *Hively*, 853 F.3d at 349. This Court and others have made the same observation. *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.2 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."

(internal citation omitted)); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) ("Under [Title VII] the standard for proving sex discrimination and race discrimination is the same."); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980) (holding that standards and orders of proof used in race discrimination cases "are generally applicable to cases of sex discrimination"). These cases are consistent with the Supreme Court's pronouncement that Title VII "on its face treats each of the enumerated categories" – race, color, religion, sex, and national origin – "exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9; *see id.* (noting that even though the case involved sex discrimination, its analysis "appl[ied] with equal force to discrimination based on race, religion, or national origin"). Other than the statutory exception for bona fide occupational qualifications, 42 U.S.C. § 2000e-2(e)(1), there is no basis in the legislative history or elsewhere for applying different criteria when analyzing claims of discrimination based on race and those based on sex.

Thus, the analysis of race-based associational discrimination described above should apply with equal force to claims of sex-based associational discrimination. As the Seventh Circuit held in *Hively* when it endorsed the application of an associational discrimination theory to a claim of sexual orientation discrimination under Title VII, "to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is

that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different." *Hively*, 853 F.3d at 349. If a plaintiff is in a relationship with someone of the same sex, and an adverse employment consequence results from that relationship, discrimination has occurred "because of [the plaintiff's] … sex," in violation of Title VII. 42 U.S.C. § 2000e-2(a); *see Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring) ("[I]f it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples.").

Sexual orientation discrimination necessarily involves sex stereotyping, in violation of Title VII.

Sexual orientation discrimination necessarily involves sex stereotyping, as it results in the adverse treatment of individuals because they do not conform to the norm that men should be attracted only to women, and women only to men. Such discrimination is at heart based on gender stereotypes – indeed, it is "as clear a gender stereotype as any." *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring); *see also Hively*, 853 F.3d at 346 (characterizing the plaintiff's lesbianism as representing "the ultimate case of failure to conform to the female stereotype" in modern America). It therefore violates Title VII's prohibition of discrimination against employees "because of … sex." *Price Waterhouse*, 490 U.S. at 240 (citing 42 U.S.C. § 2000e-2(a)(1)).

Price Waterhouse involved a woman perceived by her employer to be insufficiently feminine. Six justices agreed that comments the defendant's

representatives made about the plaintiff – that she was "macho" and "overcompensat[ing] for being a woman," and would have better chances of promotion to partnership at her firm if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" – indicated discrimination based on sex stereotypes that is illegal under Title VII. *Id.* at 235, 251. As the Court held, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. This conclusion followed from the Court's earlier recognition that Congress passed Title VII "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting *Manhart*, 435 U.S. at 707 n.13).

Many circuits have relied on *Price Waterhouse* in concluding that employers violate Title VII's prohibition against sex discrimination when they discriminate against employees for failing to conform to gender-based stereotypes by acting in an effeminate or masculine manner or by wearing gender-nonconforming clothing. *See, e.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) (holding that liability was warranted under Title VII if a jury concluded harassment occurred because the victim "fell outside of [the harasser's] manly-man stereotype"); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would

not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) ("[T]he holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. … At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act."); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (summarizing cases and concluding that "instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*").

Intentional discrimination on the basis of the gender of an individual's actual or desired partners – whether that individual is lesbian, gay, bisexual, or straight – necessarily implicates stereotypes relating to "proper" sex-specific roles in romantic and/or sexual relationships. The Seventh Circuit sitting en banc recently made this connection explicit, referring to lesbianism as "the ultimate case of failure to conform to the female stereotype" and concluding:

> [A] policy that discriminates on the basis of sexual orientation … is based on assumptions about the proper behavior for someone of a given sex. … Any discomfort, disapproval, or job decision based on the fact that the complainant – woman or man – dresses differently, speaks differently, or *dates or marries a same-sex partner*, is a reaction purely and simply based on sex. That means that it falls within Title VII's

> prohibition against sex discrimination, if it affects employment in one of the specified ways.

Hively, 853 F.3d at 346-47 (emphasis added). An increasing number of district courts have applied *Price Waterhouse* and come to the same conclusion. *See, e.g.*, *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) ("[S]tereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes, which can lead to discrimination based on what the Second Circuit refers to interchangeably as gender non-conformity. … [H]omosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 842 (W.D. Pa. 2016) ("[D]iscrimination on the basis of sexual orientation is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination 'because of sex' …."); *Videckis*, 150 F. Supp. 3d at 1160 ("Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women – and the relationships between them. Discrimination based on a perceived failure to conform to a stereotype constitutes actionable discrimination …."); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding that a homosexual plaintiff's allegations that he was denied promotions and subjected to a hostile work environment because his sexual orientation "did not conform to the Defendant's gender stereotypes associated with men" stated a sufficient claim to survive a motion to dismiss).

This connection between sexual orientation and gender nonconformity applies even if the employee exhibits no other gender-nonconforming behavior. *See Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring) ("[I]f gay, lesbian, or bisexual plaintiffs can show that they were discriminated against for failing to comply with some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men, they have made out a cognizable sex discrimination claim."); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do."); *Heller*, 195 F. Supp. 2d at 1222-24 ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men. … That Cagle perceived Heller as being a lesbian does not compel a different outcome."); *Terveer*, 34 F. Supp. 3d at 116 (holding that a complaint alleging the plaintiff's "sexual orientation is not consistent with the Defendant's perception of acceptable gender roles" stated a valid claim of sex discrimination).

II. Precedent and Practicality Also Justify Overruling *Simonton* En Banc.

In addition to the three arguments above, several additional factors counsel in favor of overruling *Simonton* and its progeny. First, the cases on which *Simonton* relied are largely no longer good law. Second, experience has shown that the distinction *Simonton* draws between valid gender nonconformity claims and invalid sexual orientation claims is unworkable in practice and leads to absurd results.

The cases on which *Simonton* relied are no longer good law.

In concluding that Title VII does not prohibit sexual orientation discrimination, *Simonton* relied on a number of cases that were subsequently overruled, either implicitly or explicitly. *Dawson*, in turn, relied on *Simonton* for this point. The irreparable erosion of those decisions' foundation further justifies overturning them en banc.

Simonton cited three out-of-circuit cases in support of its conclusion that judicial decisions consistently "refus[e] to interpret 'sex' to include sexual orientation." *Simonton*, 232 F.3d at 35-36 (citing *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996)). In light of subsequent Supreme Court decisions, however, none of these cases justifies retaining *Simonton* as binding precedent. *See Price Waterhouse*, 490 U.S. at 250-51; *Oncale v. Sundowner Offshore Oil Servs., Inc.*, 523 U.S. 75, 79 (1998) (noting that Title VII's protections extend beyond those the statute was initially enacted to combat, and cover

"reasonably comparable evils" as well). *DeSantis*, which held that Title VII does not protect against discrimination based on sex stereotypes, 608 F.2d at 331-32, was abrogated by *Price Waterhouse* and is no longer good law. *See Nichols*, 256 F.3d at 875 (recognizing abrogation). *Williamson*, a four-paragraph decision from the Eighth Circuit that predates *Price Waterhouse* and *Oncale*,[4] relies entirely on *DeSantis* without additional analysis. *Williamson*, 876 F.2d at 70. In a subsequent case reversing dismissal of a suit alleging harassment based on sex and "perceived sexual preference," the Eighth Circuit discounted *Williamson*'s precedential authority, referring to it as a "pre-*Oncale* case." *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 n.3 (8th Cir. 1999). *Wrightson* relies exclusively on *Williamson* and *DeSantis*, and was dicta on this point in any event. *Wrightson*, 99 F.3d at 143. Thus, of the three cases *Simonton* cites to support its conclusion, two are no longer followed and the third relies wholly on the other two. These cases do not justify maintaining *Simonton* in the face of more recent legal developments.

***Simonton* and *Dawson*'s distinction between permissible sexual orientation discrimination and impermissible gender stereotyping is unworkable and leads to absurd results.**

Simonton should be overruled for another, equally important reason: the distinction it draws between impermissible sex-based stereotyping and permissible

[4] Although *Williamson* came down a month after *Price Waterhouse* was announced, all briefing was concluded before the Supreme Court issued its *Price Waterhouse* decision, the opinion does not mention *Price Waterhouse*, and there is no indication the panel considered the case's potential impact on its decision.

sexual orientation discrimination is unworkable and leads to absurd results. Under current Second Circuit law, employers cannot discriminate against employees based on an "animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender," but *can* discriminate "because of sexual orientation." *Dawson*, 398 F.3d at 217-18. Given that "homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus," *Boutillier*, 221 F. Supp. 3d at 269, courts asked to differentiate between sex stereotyping and sexual orientation have understandably found the task difficult, if not essentially impossible. *See Hively*, 853 F.3d at 346 ("Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all."); *Videckis*, 150 F. Supp. 3d at 1159 ("Simply put, 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."). Indeed, even this Court recognized the inherent difficulty in this sort of line-drawing, observing that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Dawson*, 398 F.3d at 218.

The distinction drawn in *Simonton* between valid claims based on gender nonconformity and invalid ones based on sexual orientation discrimination is inherently arbitrary, leading to irrational outcomes. In *Simonton* this Court cautioned against allowing plaintiffs to rely on a *Price Waterhouse* gender-nonconformity theory to

"bootstrap protection for sexual orientation into Title VII," reasoning that the two are not interchangeable "because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton*, 232 F.3d at 38; *see also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1259-60 (11th Cir. 2017) (Pryor, J., concurring) (distinguishing between homosexual status and homosexual conduct). But this leads to the absurd result that *only* those gay men who act "stereotypically feminine" and those lesbians who act stereotypically masculine are entitled to protection from discrimination. *See Christiansen*, 852 F.3d at 200; *cf. Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (focusing on plaintiff's high voice, failure to curse, grooming, clothes, neatness, manner of crossing his legs, effeminacy, conversational interests, and degree of "pizzazz" when operating a work machine in determining whether the claimed discrimination was based on gender stereotypes rather than sexual orientation). In short, "[p]laintiffs who 'look gay' succeed under Title VII while those merely known or thought to be gay do not." Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 766 (2014). Whether an individual is entitled to protection under federal law cannot turn on such an arbitrary factor.

It is similarly absurd to hold that Title VII protects persons like the heterosexual employee in *Boh Brothers*, 731 F.3d at 459-60, from egregious same-sex harassment but does not protect a homosexual man from similarly egregious harassment, as in *Simonton*. 232 F.3d at 35 (noting that the plaintiff was subjected to

vulgar, graphic comments and conduct). There is no justification for such a judicially created "carve-out" exception that offers protections to most individuals but denies them to gays and lesbians. Even more absurd, as the law now stands in this Circuit, employees are free to marry their same-sex partners, as the Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), but can lawfully be fired the next day for doing so. Overruling *Simonton* and holding that Title VII protects against sexual orientation discrimination would eliminate these inconsistent and arbitrary results.

III. The Contrary Arguments Do Not Justify Retaining *Simonton* as Binding Authority.

Opponents to the EEOC's position have raised two additional arguments – based in part on *Simonton* itself – against finding that Title VII's ban on sex discrimination extends to sexual orientation discrimination. Neither provides a sufficient justification to retain *Simonton* as the law of this Circuit.

First, some have argued that Title VII would not have been reasonably understood to protect against sexual orientation discrimination when Congress enacted it in 1964. *See, e.g.*, *Hively*, 853 F.3d at 360-63 (Sykes, J., dissenting). But as the Supreme Court clearly held when discussing Title VII, "[S]tatutory prohibitions often go beyond the principal evil [the law was passed to address] 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." *Oncale*, 523 U.S. at 79; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J.,

concurring in part and dissenting in part) (explaining that "[t]he evils against which [Title VII] is to be aimed are defined broadly"). Indeed, the Court has taken this approach repeatedly when interpreting Title VII. It has recognized, for example, that the statute's prohibition against discrimination in the terms and conditions of employment encompasses sexual harassment of an employee, *see Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986), and that the term "because of … sex" can include same-sex harassment, *see Oncale*, 523 U.S. at 79-80, though Congress likely considered neither issue when it initially passed the law. As explained above, in cases of sexual orientation discrimination, "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (internal quotation marks omitted). This situation "meets the statutory requirements" of Title VII and warrants its protections, regardless of Congress's interpretation in 1964. *Id.* As the Seventh Circuit explained in *Hively*, an en banc court "sits … to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago." *Hively*, 853 F.3d at 350.

Second, the panel in *Simonton* emphasized the fact that Congress has not enacted bills that would have explicitly extended Title VII to prohibit sexual orientation discrimination. *Simonton*, 232 F.3d at 35; *Evans*, 852 F.3d at 1261 (Pryor, J., concurring). But the Supreme Court has made clear that the outcome of legislative efforts to amend Title VII over the years says nothing about what the existing statute

prohibits. As the Court explained, "[S]ubsequent legislative history is . . . a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law," because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). With respect to failed proposals to offer explicit workplace protections on the basis of sexual orientation, it is possible legislators objected to the proposed addition of other protections as well, or disagreed with the language of proposed exemptions, or did not think the proposed protections extended far enough. *See, e.g.*, Jill D. Weinberg, *Gender Non-Conformity: An Analysis of Perceived Sexual Orientation & Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. Rev. 1, 8 (2009) (noting that the proposed Equality Act of 1974 would have added protections on the basis of both sexual orientation and marital status); Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 Law & Sexuality 1, 4, 8-11 (2010) (noting opposition to one version of the Employment Non-Discrimination Act based on its failure to protect transgender individuals, as well as debate over the scope of exemptions). In short, "we have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member's votes, much less what explains the failure of the body as a whole to change this 1964 statute." *Hively*, 853 F.3d at 344.

CONCLUSION

For the foregoing reasons, *Simonton* should be overruled, the judgment of the district court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume requirements set forth in Federal Rules of Appellate Procedure Rules 29(a)(5) and Second Circuit Local Rules 29.1(c) and 32.1(a)(4)(A). This brief contains 6,096 words, from the Statement of Interest through the Conclusion, as determined by the Microsoft Word 2016 word processing program, with 14-point proportionally spaced type for text and footnotes.

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CERTIFICATE OF SERVICE

I, Jeremy D. Horowitz, hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system and filed 15 copies of the foregoing brief with the Court by next business day delivery, postage pre-paid, this 23rd day of June, 2017. I also certify that all counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system.

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EXHIBIT 2

15-3775

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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

Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as SKYDIVE LONG ISLAND;
and RAY MAYNARD,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INTRODUCTION AND INTEREST OF THE UNITED STATES

The United States files this amicus brief pursuant to 28 U.S.C. 517 and Federal Rule of Appellate Procedure 29(a). This case presents the question whether, under Title VII of the Civil Rights Act of 1964, the statute's prohibitions on employment discrimination because of sex include discrimination because of sexual orientation.

The United States, through the Attorney General, enforces Title VII against state or local government employers, 42 U.S.C. 2000e-5(f)(1), and the United States is also subject to Title VII in its capacity as the Nation's largest employer. 42 U.S.C. 2000e-16. The United States thus has a substantial and unique interest in the proper interpretation of Title VII. Although the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5(f)(1), and it has filed an amicus brief in support of the employee here, the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade. *EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 257-58 (1991).

The United States submits that the en banc Court should reaffirm its settled precedent holding, consistent with the longstanding position of the Department of Justice, that Title VII does not reach discrimination based on sexual orientation. Unlike the recent, contrary decision in *Hively v. Ivy Tech Community College*, 853 F.3d 339 (7th Cir. 2017) (en banc), this Court's well-established position correctly reflects the plain meaning of the statute, the overwhelming weight and reasoning of the case law,

and the clear congressional ratification of that interpretation. The question presented is not whether, as a matter of policy, sexual orientation discrimination should be prohibited by statute, regulations, or employer action. In fact, Congress and the Executive Branch have prohibited such discrimination in various contexts. *See, e.g.*, 18 U.S.C. 249(a)(2) (hate crimes); 42 U.S.C. 13925(b)(13)(A) (certain federal funding programs); Exec. Order 13,672 (July 21, 2014) (government contracting); Exec. Order 13,087 (May 29, 1998) (federal employment); 5 C.F.R. 300.103(c) (non-performance-related treatment under the Civil Service Reform Act, 5 U.S.C. 2302(b)(10)). The sole question here is whether, as a matter of law, Title VII reaches sexual orientation discrimination. It does not, as has been settled for decades. Any efforts to amend Title VII's scope should be directed to Congress rather than the courts.

STATUTORY BACKGROUND

Title VII of the Civil Rights Act of 1964 prohibits private employers from discriminating against an individual "because of," among other protected traits, "such individual's * * * sex." 42 U.S.C. 2000e-2(a). In 1972, Congress extended that prohibition to state and local government employers, *see* 42 U.S.C. 2000e(b), and it also enacted a similar prohibition on discrimination against federal government employees "based on * * * sex," 42 U.S.C. 2000e-16(a). Congress did not define the term "sex" when it enacted these antidiscrimination provisions. Indeed, "sex" was added as a protected trait in a floor amendment "at the last minute" before the House passed the 1964 bill. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 63-64 (1986).

In 1978, Congress amended Title VII's definition of "sex." Two years earlier, the Supreme Court had held that Title VII's prohibition on discrimination because of sex did not cover an employer's exclusion of pregnancy from coverage under a disability-benefits plan. *General Elec. Co. v. Gilbert*, 429 U.S. 125, 135-40 (1976). Congress abrogated that holding in the Pregnancy Discrimination Act by specifying that Title VII's prohibition on "sex" discrimination would be deemed to "include" discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. 2000e(k). Congress did not, however, otherwise delineate the scope of the term "sex."

In 1991, Congress further amended Title VII. *See* Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). As detailed below, by that time, several courts of appeals had held that Title VII does not prohibit sexual orientation discrimination, and no court of appeals had held otherwise. Against the backdrop of that precedent, Congress neither added sexual orientation as a protected trait nor defined discrimination on the basis of sex to include sexual orientation discrimination—notwithstanding that Congress amended the provisions concerning sex discrimination in other respects and overruled numerous other judicial precedents with which it disagreed. In fact, every Congress from 1974 to the present has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation. *See* Addendum A.

ARGUMENT

I. TITLE VII'S BAR AGAINST DISCRIMINATION BECAUSE OF SEX IS NOT VIOLATED UNLESS MEN AND WOMEN ARE TREATED UNEQUALLY

The term "sex" is not defined in Title VII, but, as Judge Sykes observed in *Hively* without dispute from the majority, "[i]n common, ordinary usage in 1964—and now, for that matter—the word 'sex' means biologically *male* or *female*." 853 F.3d at 362 (dissenting op.) (citing dictionaries). As for the term "discrimination," the Supreme Court has held that Title VII requires a showing that an employer has treated "similarly situated employees" of different sexes unequally. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 258-59 (1981).

Under the paradigmatic Title VII "disparate treatment" claim, "[t]he central focus of the inquiry" is whether the employer has treated "some people less favorably than others because of their * * * sex." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 569, 577 (1978). The requisite showing is thus that "an employer intentionally treated a complainant *less favorably* than employees with the complainant's qualifications but outside the complainant's protected class." *Young v. United Parcel Serv.*, 135 S. Ct. 1338, 1345 (2015) (emphasis added and quotation marks omitted).

Likewise, a Title VII "sexual harassment" claim may be brought, for either opposite-sex or same-sex harassment, if and only if the harassment constitutes "*discriminat[ion]* * * * because of * * * sex." *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting 42 U.S.C. 2000e-2(a)(1)). Harassment is thus not

"automatically discrimination because of sex merely because the words used have sexual content or connotations." *Id.* Instead, "[t]he critical issue, Title VII's text indicates, is whether members of one sex are exposed to *disadvantageous terms or conditions* of employment to which members of the other sex are not exposed." *Id.* (emphasis added).

So too for a claim of "sex stereotyping" under Title VII. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality op.). Although an employer cannot "evaluate employees by assuming or insisting that they match[ ] the stereotype associated with their group," "[t]he plaintiff must show that the employer actually relied on her [or his] gender in making its decision." *Id.* For example, "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender," because that particular sort of "sex-based consideration[ ]" of gender stereotypes results in "*disparate treatment* of men and women." *Id.* at 242, 250-51 (emphasis added); *see also id.* at 251 ("An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not.").

By contrast, Title VII does not proscribe employment practices that take account of the sex of employees but do not impose differential burdens on similarly situated members of each sex. For example, employers necessarily consider the sex of their employees when maintaining and enforcing sex-specific bathrooms, but that

alone does not constitute per se discriminatory treatment. Such practices do not categorically violate Title VII because they do not *discriminate* between members of one sex and "similarly situated" members of the opposite sex. *See Michael M. v. Superior Ct.*, 450 U.S. 464, 469 (1981) (plurality op.).

II. DISCRIMINATION BECAUSE OF SEXUAL ORIENTATION IS NOT DISCRIMINATION BECAUSE OF SEX UNDER TITLE VII

As the Courts of Appeals and the EEOC had long interpreted Title VII until recently, when Congress prohibited sex discrimination, it did not also prohibit sexual orientation discrimination. And Congress has clearly ratified that interpretation of Title VII, in repeated and varied ways.

A. Until Recently, The Courts Of Appeals And The EEOC Had Uniformly Held That Sexual Orientation Discrimination Is Not Prohibited Sex Discrimination Under Title VII

As the courts have long held, discrimination based on sexual orientation does not fall within Title VII's prohibition on sex discrimination because it does not involve "disparate treatment of men and women." *See Price Waterhouse*, 490 U.S. at 251. Rather than causing similarly situated "members of one sex [to be] exposed to disadvantageous terms or conditions of employment [or employment actions] to which members of the other sex are not exposed," *see Oncale*, 523 U.S. at 80, it causes differential treatment of gay and straight employees for men and women alike.

Accordingly, this Court has repeatedly held that "Title VII does not proscribe discrimination because of sexual orientation" "[b]ecause the term 'sex' in Title VII refers only to membership in a class delineated by gender." *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *accord Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005). In *Simonton*, this Court rejected the plaintiff's argument that *Oncale* supports applying Title VII to sexual orientation discrimination, emphasizing that *Oncale* instead had reaffirmed that "[t]he critical issue * * * 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Simonton*, 232 F.3d at 36 (quoting *Oncale*, 523 U.S. at 80). Similarly, in *Dawson*, this Court rejected the plaintiff's attempt to use a gender stereotyping claim under *Price Waterhouse* to "bootstrap protection for sexual orientation into Title VII," emphasizing that *Price Waterhouse* instead had reaffirmed that the essential element is "disparate treatment of men and women." *Dawson*, 398 F.3d at 218, 220-21 (quoting *Price Waterhouse*, 490 U.S. at 251).

Likewise, until the Seventh Circuit's en banc decision in *Hively* earlier this year, the ten other Courts of Appeals to have addressed the issue had uniformly joined this Court in holding that Title VII's prohibition on sex discrimination does not encompass sexual orientation discrimination. *See, e.g.*, *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017), *rehearing en banc denied* (July 6, 2017); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d

1058, 1063 (7th Cir. 2003), *overruled by Hively*, *supra*; *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut*, 99 F.3d 138, 143 (4th Cir. 1996); *Williamson v. A.G. Edwards & Sons*, 876 F.2d 69, 70 (8th Cir. 1989); *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-30 (9th Cir. 1979), *abrogated in part on other grounds*, *Nichols v. Azteca Restaurant Enterpr., Inc.*, 256 F.3d 864, 874-75 (9th Cir. 2001); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).

The EEOC also until recently had "consistently held that discrimination based on sexual orientation is not actionable under Title VII," including after the Supreme Court decided *Price Waterhouse* and *Oncale*. *Angle v. Veneman*, EEOC Doc. 01A32644, 2004 WL 764265, at *2 (April 5, 2004); *accord Marucci v. Caldera*, EEOC Doc. 01982644, 2000 WL 1637387, at *2-*3 (Oct. 27, 2000); *Dillon v. Frank*, EEOC Doc. 01900157, 1990 WL 1111074, at *3 (Feb. 14, 1990); *but see Baldwin v. Foxx*, EEOC Doc. 0120133080, 2015 WL 4397641 (July 15, 2015) (reversing course and holding that sexual orientation discrimination is per se sex discrimination).

B. Congress Has Repeatedly Ratified The Settled Understanding That Title VII Does Not Bar Sexual Orientation Discrimination

1. It is a well-established interpretive principle that "Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change." *Lorillard v. Pons*, 434 U.S. 575, 580 (1978); *see Faragher v. City of Boca Raton*, 524 U.S. 775, 792 (1998)

("[T]he force of precedent here is enhanced by Congress's amendment to the liability provisions of Title VII since the *Meritor* decision, without providing any modification of our holding.").

The Supreme Court recently applied this principle in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). The Court there observed that, when Congress in 1988 amended the Fair Housing Act (FHA), 42 U.S.C. 3601 *et seq.*, it "was aware of th[e] unanimous precedent" of multiple Courts of Appeals holding that the FHA authorized disparate impact claims, and "with that understanding, [Congress] made a considered judgment to retain the relevant statutory text." *Id.* at 2519. The Court explained that, "[a]gainst this background understanding in the legal and regulatory system, Congress' decision in 1988 to amend the FHA while still adhering to the operative language * * * is convincing support for the conclusion that Congress accepted and ratified" that understanding: "[if] a word or phrase has been * * * given a uniform interpretation by inferior courts * * *, a later version of that act perpetuating the wording is presumed to carry forward that interpretation." *Id.* at 2520. Finally, the Court found further "confirmation of Congress' understanding" in "the substance of the 1988 amendments," which the Court believed "logical[ly] * * * presupposed" that disparate impact was available under the pre-1988 version of the FAA. *Id.*; *but see id.* at 2540-41 (Alito, J., dissenting) (describing the 1988 amendments instead as "a compromise among [three] factions").

2. When Congress enacted the Civil Rights Act of 1991, *supra*, it ratified the settled understanding that Title VII does not bar sexual orientation discrimination. Compared to *Inclusive Communities*, the argument for ratification here is at least as strong, if not stronger, for four reasons.

First, Congress undoubtedly "was aware of th[e] unanimous precedent" of multiple Courts of Appeals holding that Title VII does not prohibit sexual orientation discrimination. *Inclusive Communities*, 135 S. Ct. at 2519. Four Courts of Appeals had already so held by 1991, and this Court had strongly so suggested. *See Williamson*, 876 F.2d at 70; *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081, 1085 (7th Cir. 1984); *DeSantis*, 608 F.2d at 329-30; *Blum*, 597 F.2d at 938; *see also DeCintio v. Westchester Cnty. Med. Ctr.*, 807 F.2d 304, 306-07 (2d Cir. 1986) (holding that sex discrimination barred by Title VII "must be a distinction based on a person's sex, not on his or her sexual affiliations"). Notably, although a few more Courts of Appeals than that had ruled at the time of the 1988 FHA amendments, *Inclusive Communities*, 135 S. Ct. at 2519 (nine overall), the interpretive question there nevertheless was far more contested, because President Reagan expressly disagreed with all those courts when he signed the amendments, *id.* at 2540-41 (Alito, J., dissenting). By contrast, when President Bush signed the 1991 Title VII amendments, there is no indication that he disagreed with the uniform view of the Courts of Appeals—and the EEOC, *see, e.g.*, *Dillon*, 1990 WL 1111074, at *3; *Tyler v. Marsh*, EEOC Doc. 05890720, 1989 WL 1007268, at *1 (Aug. 10, 1989)—that the statute does not reach sexual orientation discrimination.

Second, "[a]gainst this background understanding," Congress "amend[ed] [Title VII] while still adhering to the operative language." *Inclusive Communities*, 135 S. Ct. at 2520. Whereas Congress added new provisions that used the term "sex" in the course of setting forth methods and burdens of proof for sex discrimination claims, it neither included sexual orientation within the definition of sex nor added it as an independently protected trait. *See*, *e.g.*, Pub. L. No. 102-166, §§ 105-107, 105 Stat. 1071, 1074-75 (1991) (adding subsections (k)(1)(A), (l), and (m) to 42 U.S.C. 2000e-2).

Third, further "confirmation of Congress' understanding" exists in "the substance of the [1991] amendments." *Inclusive Communities*, 135 S. Ct. at 2520. Namely, those amendments left standing the judicial decisions that had rejected Title VII's application to sexual orientation discrimination while expressly abrogating several other Title VII decisions that Congress believed had "sharply cut back on the scope and effectiveness" of the statute. *Ricci v. DeStefano*, 557 U.S. 557, 624 (2009) (quoting H.R. Rep. No. 102-40, pt. 2, at 2 (1991)). For example, Congress modified the framework for disparate-impact claims in response to *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *see* 42 U.S.C. 2000e-2(k), and for mixed-motive claims in response to *Price Waterhouse*, *see* 42 U.S.C. 2000e-2(m), 2000e-5(g)(2). Moreover, this prompt abrogation of narrow judicial readings of Title VII followed in the footsteps of Congress's abrogation of the 1976 *Gilbert* decision in the 1978 Pregnancy Discrimination Act. *Supra* at p. 3. In short, it is telling that Congress elected not to disturb the cases holding that Title VII does not bar sexual orientation discrimination,

because Congress "has not been shy in revising other judicial constructions" of Title VII that it has deemed unduly narrow. *See General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 594 n.7 (2004).

Finally, the 1991 Congress also declined to enact proposed legislation that would have expressly amended Title VII to bar discrimination based on "sex, affectional or sexual orientation." 137 Cong. Rec. 6162. As its sponsors themselves recognized, the proposed legislation was necessary because sex discrimination is different from sexual orientation discrimination and there was an "absence of Federal laws" prohibiting the latter. 137 Cong. Rec. 5261, 6161 (statements of Sen. Cranston and Rep. Weiss). In fact, Congress had rejected multiple prior efforts to enact such laws. *See, e.g.*, *Ulane*, 742 F.2d at 1085 & n.11.

3. After the Civil Rights Act of 1991, Congress has continued to confirm that Title VII does not bar sexual orientation discrimination.

First, every subsequent Congress since 1991 (as well as every prior Congress going back to 1974) has declined to enact proposed legislation that would prohibit discrimination in employment based on sexual orientation. *See* Addendum A. And Congress did so even as the number of Courts of Appeals holding that Title VII does not reach such discrimination grew to a unanimous eleven. *Supra* at pp. 7-8. Such "congressional silence after years of judicial interpretation supports adherence to the traditional view." *Cline*, 540 U.S. at 594; *see also Simonton*, 232 F.3d at 35 ("Although congressional inaction subsequent to the enactment of a statute is not always a helpful

guide," the sheer number of unsuccessful attempts to amend the statute in the face of such a uniform body of law "is strong evidence of congressional intent.").

Second, Congress expressly prohibited sexual orientation discrimination in several other statutes that separately prohibit sex discrimination. *See, e.g.*, 18 U.S.C. 249(a)(2) (enhanced penalties for crimes motivated by "gender" or "sexual orientation"); 42 U.S.C. 13925(b)(13)(A) (no discrimination based on "sex" or "sexual orientation" under certain federally funded programs); *see also* 42 U.S.C. 3716(a)(1)(C) (federal aid to state or local investigations of crimes motivated by "gender" or "sexual orientation"). Moreover, in each of these statutes, Congress listed "sexual orientation" discrimination *in addition to* "sex" or "gender" discrimination, rather than deeming "sexual orientation" discrimination to be *"include[d]" within* "sex" discrimination, as it did for pregnancy discrimination. 42 U.S.C. 2000e(k) (emphasis added). This demonstrates both that Congress considers "sexual orientation" discrimination to be distinct from, rather than a subset of, "sex" or "gender" discrimination, and also that Congress knows how to cover "sexual orientation" discrimination separately from "sex" or "gender" discrimination when it so chooses.[1]

[1] Conversely, Congress expressly excluded "homosexuality" from disability discrimination statutes that were passed in 1973 and 1990. *See* 29 U.S.C. 705(20)(E); 42 U.S.C. 12211(a). Given that each of these statutes was passed within a year of amendments to Title VII's prohibitions on sex discrimination, *supra* at pp. 2-3, it is particularly implausible to interpret those prohibitions as including sexual orientation discrimination implicitly.

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4. Accordingly, this is not a situation where "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." *Oncale*, 523 U.S. at 79. When adopting Title VII's ban on sex discrimination in 1964, and especially when amending it in 1991, Congress was well aware of the distinct practice of sexual orientation discrimination and chose not to ban it also.

To be sure, there have since been notable changes in societal and cultural attitudes about such discrimination, but Congress has consistently declined to amend Title VII in light of those changes, despite having been repeatedly presented with opportunities to do so. And more fundamentally, even unforeseen circumstances do not present courts with a license to "rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done" to implement a clear statute's policy objectives. *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). Although such an "evolution * * * might invite reasonable disagreements on whether Congress should reenter the field and alter the judgments it made in the past," the Supreme Court has resoundingly reaffirmed that "the proper role of the judiciary [is] to apply, not amend, the work of the People's representatives." *Id.* at 1725-26.

III. THE THEORIES ADVANCED BY THE EEOC AND THE SEVENTH CIRCUIT LACK MERIT, LET ALONE SUFFICIENT MERIT TO OVERCOME CONGRESS'S RATIFICATION OF THE CONTRARY INTERPRETATION

The EEOC's amicus brief, which is based on its decision in *Baldwin*, presents three theories why sexual orientation discrimination is barred under Title VII: (1) it is necessarily sex discrimination as it would not occur "but for" the sex of the gay employee; (2) it is per se sex-stereotyping; and (3) it is gender-based associational discrimination. EEOC Br. at 4; *Baldwin*, 2015 WL 4397641 at *5-10. The Seventh Circuit majority in *Hively* largely adopted the EEOC's theories. 853 F.3d at 343-52. These theories are inconsistent with Congress's clear ratification of the overwhelming judicial consensus that Title VII does not prohibit sexual orientation discrimination. And even viewed solely on their own terms, none of these theories is persuasive.

A. "But For" The Employee's Sex

The EEOC and the Seventh Circuit majority contend that sexual orientation discrimination is necessarily sex discrimination because the employer allegedly flunks "'the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.'" EEOC Br. at 6 (quoting *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)); *see Hively*, 853 F.3d at 345-46. For instance, they hypothesize a male employee who is discriminated against because he has a male partner, but who would not have been discriminated against if he were a woman with the same male partner, and they thus

conclude that such an employee would not have been discriminated against "but for" his sex. EEOC Br. at 6; *Hively*, 853 F.3d at 345. This analysis commits two fundamental errors in applying the "but for" test for sex discrimination.

First, as the Seventh Circuit dissent correctly observed, the but-for "comparison can't do its job of *ruling in* sex discrimination as the actual reason for the employer's decision * * * if we're not scrupulous about holding *everything* constant except the plaintiff's sex." *Hively*, 853 F.3d at 366 (Sykes, J., dissenting). The EEOC and the Seventh Circuit majority fail to hold everything else constant because their hypothetical changes both the employee's sex (from male to female) *and* his sexual orientation (from gay to straight). The proper comparison would be to change the employee's sex (from male to female) but to keep the sexual orientation constant (as gay). In that hypothetical, the employer satisfies *Manhart*'s "simple test," because the employee would be adversely affected *regardless of sex* (whether as a gay man or a gay woman).

Second, even if the EEOC and the Seventh Circuit majority were properly applying the "but for" test, that test does not establish "disparate treatment of men and women," *Price Waterhouse*, 490 U.S. at 251, where an employer addresses a circumstance that "the sexes are not similarly situated," *Michael M.*, 450 U.S. at 469. Again, a simplistic application of the "but for" test would mean that sex-specific bathrooms are always unlawful sex discrimination, because a man would never be prohibited from using the women's room if he were a woman (or vice versa). That,

of course, is not the law—an employer does not engage in sex discrimination when it accounts for a sex-based difference without treating either sex worse than the other.

Notably, outside the context of sexual orientation discrimination, other Courts of Appeals have rejected the mechanical use of the "but for" test urged by the EEOC and the Seventh Circuit majority. For example, the en banc Ninth Circuit has emphasized that it and other Circuits have "long recognized that companies may differentiate between men and women in appearance and grooming policies" so long as the policy "does not unreasonably burden one gender more than the other," even though this means that individual employees who fail to comply with the policy's "sex-differentiated requirements" would not have been disciplined but for their sex. *Jespersen v. Harrah's Operating Co., Inc.*, 444 F.3d 1104, 1109-10 (9th Cir. 2006) (en banc). Moreover, the Fourth Circuit recently held that an employer may use "physical fitness standards that distinguish between the sexes on the basis of their physiological differences but impose an equal burden of compliance on both men and women," because "[a] singular focus on the 'but for' element * * * skirts the fundamental issue of whether those normalized requirements treat men in a different manner than women." *Bauer v. Lynch*, 812 F.3d 340, 351 (4th Cir. 2016).

In sum, an employer who discriminates based on sexual orientation alone does not treat similarly situated employees differently but for their sex. Gay men and women are treated the same, and straight men and women are treated the same. Of course, if an employer fired only gay men but not gay women (or vice versa), that

would be prohibited by Title VII—but precisely because it would be discrimination based on sex, not sexual orientation.

B. Per Se Sex-Stereotyping

The EEOC and the Seventh Circuit majority also contend that sexual orientation discrimination necessarily involves sex stereotyping because it allegedly targets an employee's failure to conform to the gender norm of opposite-sex attraction. EEOC Br. 13; *Hively*, 853 F.3d at 346. For instance, they assert that lesbianism is "the ultimate case of failure to conform to the female stereotype." EEOC Br. 13 (quoting *Hively*, 853 F.3d at 346). Again, this analysis commits two fundamental errors in applying the sex-stereotyping theory.

First, it erroneously presumes that sexual orientation discrimination always reflects a gender-based stereotype. When bringing a sex-stereotyping claim, an employee "must show that the employer actually relied on her [or his] gender in making its decision." *Price Waterhouse*, 490 U.S. at 251. What this means is that, "if we asked the employer at the moment of the decision what its reasons were and if we received a truthful response, one of those reasons would be that the applicant or employee was a woman [or man]." *Id.* at 250. In *Price Waterhouse*, for example, the "employer who act[ed] on the basis of a belief that a woman cannot be aggressive, or that she must not be, ha[d] acted on the basis of gender." *Id.*

But where an employer discriminates against a female employee solely because she is gay (without regard to whether, for instance, she has masculine manners or

clothing), it is not necessarily true that the employer has "actually relied on her gender in making its decision." *Price Waterhouse*, 490 U.S. at 251. Rather, the employer may have treated homosexuality differently for reasons such as moral beliefs about sexual, marital, and familial relationships that need not be based on views about gender at all. *See Hively*, 853 F.3d at 370 (Sykes, J., dissenting). That may be impermissible treatment under other statutes or rules, but it is not covered by Title VII's ban on "sex" discrimination.

Second, even if sexual orientation discrimination can sometimes or always be conceptualized as a gender-based stereotype, it is not the sort of stereotype barred by *Price Waterhouse*. As the Court explained, Title VII bars "sex stereotypes" insofar as that particular sort of "sex-based consideration[ ]" causes "disparate treatment of men and women." 490 U.S. at 242, 251. There, for example, the stereotype against aggressive women treated businesswomen worse than similarly situated businessmen: "[a]n employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not." *Id.* at 251.

By contrast, the opposite-sex attraction "stereotype" relied upon by the EEOC and the Seventh Circuit majority does not result in disparate treatment of the sexes because men are treated no better or worse than similarly situated women. Indeed, treating such gender-neutral "stereotypes" as prohibited by Title VII would lead to absurd results. For example, one could just as easily, if not more easily, assert that

"the ultimate case of failure to conform to the female stereotype" (EEOC Br. at 13) is a woman's failure to use the woman's bathroom. Again, though, no one can seriously contend that *Price Waterhouse* outlawed sex-specific bathrooms.

That said, Title VII of course prohibits employers from applying impermissible sex stereotypes to homosexual employees. Namely, gay employees, just like straight employees, may invoke *Price Waterhouse* if they are subjected to gender-based stereotypes—*e.g.*, that a particular homosexual man is too effeminate—that cause them to be treated worse than similarly situated employees of the opposite sex. *See Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 290 (3d Cir. 2009). Critically, though, that is because such gender stereotyping truly is sex discrimination rather than sexual orientation discrimination: the same claim could be brought by a heterosexual male whom the employer likewise deemed too effeminate. *See id.* As this Court has emphasized, homosexual individuals "do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination" than do heterosexual individuals. *Christiansen v. Omnicon Grp., Inc.*, 852 F.3d 195, 200-01 (2d Cir. 2017).[2]

[2] As a factual matter, there sometimes may be a "difficult question" whether discriminatory treatment against a gay plaintiff "was because of his homosexuality, his effeminacy, or both." *See Prowel*, 579 F.3d at 291. Nevertheless, the plaintiff may prevail if it can satisfy the burden to "marshal[ ] sufficient evidence"—*e.g.*, through comparator employees or direct evidence of employer motive—"such that a reasonable jury could conclude that harassment or discrimination occurred" because of gender stereotypes rather than just because of sexual orientation. *See id.* at 292; *see also, e.g.*, *Dawson*, 398 F.3d at 216-23.

In sum, an employer who discriminates based on sexual orientation alone does not apply the sort of sex stereotype proscribed by *Price Waterhouse*. Rather than a gender-based norm that causes employees of one sex to be treated worse than similarly situated employees of the other sex, sexual orientation discrimination per se applies to both sexes alike.

C. Associational Discrimination

The EEOC and the Seventh Circuit majority finally contend that sexual orientation discrimination is "associational discrimination" on the basis of sex. EEOC Br. at 10; *Hively*, 853 F.3d at 348-49. Relying on cases addressing discrimination against interracial relationships, the EEOC and the Seventh Circuit majority reason that Title VII similarly prohibits discrimination based on the sex of those with whom an employee associates. EEOC Br. at 10; *Hively*, 853 F.3d at 348-49. This analogy to racial discrimination is fundamentally inapposite.

Title VII prohibits an employer from discriminating against an employee in an inter*racial* relationship, *not* because that constitutes "associational discrimination" as such, but rather because that constitutes discrimination against the "individual [employee] * * * because of such individual's race." 42 U.S.C. 2000e-2(a). In particular, the employer is treating an employee of one race differently from similarly situated employees of the partner's race, solely because the employer deems the employee's own race to be either *inferior* or *superior* to the partner's race. For example, in *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), this Court held that a white

employee could bring a claim that he was treated worse for marrying a black woman, as that was discrimination "because of the employee's *own* race," especially in light of evidence that he himself was "insult[ed] * * * in public" as "a [n-word] lover." *Id.* at 134, 138-40. By contrast, an employer who discriminates against an employee in a same-sex relationship is not engaged in sex-based treatment of women as inferior to similarly situated men (or vice versa), but rather is engaged in sex-neutral treatment of homosexual men and women alike.

* * *

At bottom, none of the theories advanced by the EEOC and the Seventh Circuit can overcome Title VII's plain text and the longstanding precedent of this Court and others. The essential element of sex discrimination under Title VII is that employees of one sex must be treated worse than similarly situated employees of the other sex, and sexual orientation discrimination simply does not have that effect. Moreover, whatever this Court would say about the question were it writing on a blank slate, Congress has made clear through its actions and inactions in this area that Title VII's prohibition of sex discrimination does not encompass sexual orientation discrimination. Other statutes and rules may prohibit such discrimination, but Title VII does not do so as a matter of law, and whether it should do so as a matter of policy remains a question for Congress to decide.

CONCLUSION

This Court should reaffirm its precedent holding that Title VII does not prohibit discrimination because of sexual orientation.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Garamond, a proportionally spaced font. According to the word count of Microsoft Word, the brief contains 5,619 words, excluding the parts of the brief exempted under Rule 32(a)(7)(B)(iii).

/s/ Charles W. Scarborough
Charles W. Scarborough

CERTIFICATE OF SERVICE

I hereby certify that on July 26, 2017, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Charles W. Scarborough
Charles W. Scarborough

Attachment A

Proposed Legislation From 1974 To Present That Would Bar Employment Discrimination Based On Sexual Orientation

1970s

- Equality Act of 1974, H.R. 14752, 93d Cong. (1974)
- Civil Rights Amendments of 1975, H.R. 166, 94th Cong. (1975)
- A Bill to Prohibit Discrimination on the Basis of Sex, Marital Status, Affectional or Sexual Preference, H.R. 2667, 94th Cong. (1975)
- Civil Rights Amendments of 1975, H.R. 5452, 94th Cong. (1975)
- Civil Rights Amendments of 1975, H.R. 10389, 94th Cong. (1975)
- Civil Rights Amendments of 1976, H.R. 13019, 94th Cong. (1976)
- Civil Rights Amendments of 1975, H.R. 451, 95th Cong. (1977)
- Civil Rights Amendments of 1977, H.R. 2998, 95th Cong. (1977)
- Civil Rights Amendments of 1977, H.R. 4794, 95th Cong. (1977)
- Civil Rights Amendments of 1977, H.R. 5239, 95th Cong. (1977)
- Civil Rights Amendments Act of 1977, H.R. 7775, 95th Cong. (1977)
- Civil Rights Amendments Act of 1977, H.R. 8268, 95th Cong. (1977)
- Civil Rights Amendments Act of 1977, H.R. 8269, 95th Cong. (1977)
- Civil Rights Amendment Act of 1979, H.R. 2074, 96th Cong. (1979)
- A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 2081, 96th Cong. (1979)

1980s

- Civil Rights Amendments Act of 1981, H.R. 1454, 97th Cong. (1981)
- Civil Rights Amendments Act of 1981, H.R. 3371, 97th Cong. (1981)
- A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 1708, 97th Cong. (1981)
- A Bill to Prohibit Employment Discrimination on the Basis of Sexual Orientation, S. 430, 98th Cong. (1983)
- Civil Rights Amendments Act of 1983, H.R. 427, 98th Cong. (1983)
- Civil Rights Amendments Act of 1983, H.R. 2624, 98th Cong. (1983)
- Civil Rights Amendments Act of 1985, H.R. 230, 99th Cong. (1985)
- Civil Rights Amendments Act of 1985, S. 1432, 99th Cong. (1985)
- Civil Rights Amendments Act of 1987, H.R. 709, 100th Cong. (1987)
- Civil Rights Amendments Act of 1987, S. 464, 100th Cong. (1987)
- Civil Rights Amendments Act of 1989, H.R. 655, 101st Cong. (1989)

- Civil Rights Amendments Act of 1989, S. 47, 101st Cong. (1989)

1990s

- Civil Rights Amendments Act of 1991, S. 574, 102d Cong. (1991)
- Civil Rights Amendments Act of 1991, H.R. 1430, 102d Cong. (1991)
- Civil Rights Amendments Act of 1993, H.R. 423, 103d Cong. (1993)
- Civil Rights Act of 1993, H.R. 431, 103d Cong. (1993)
- Employment Non-Discrimination Act of 1994, H.R. 4636, 103d Cong. (1994)
- Employment Non-Discrimination Act of 1994, S. 2238, 103d Cong. (1994)
- Civil Rights Amendments Act of 1995, H.R. 382, 104th Cong. (1995)
- Employment Non-Discrimination Act of 1995, H.R. 1863, 104th Cong. (1995)
- Employment Non-Discrimination Act of 1995, S. 932, 104th Cong. (1995)
- Employment Non-Discrimination Act of 1996, S. 2056, 104th Cong. (1996)
- Employment Non-Discrimination Act of 1997, H.R. 1858, 105th Cong. (1997)
- Employment Non-Discrimination Act of 1997, S. 869, 105th Cong. (1997)
- Civil Rights Amendments Act of 1998, H.R. 365, 105th Cong. (1998)
- Civil Rights Amendments Act of 1999, H.R. 311, 106th Cong. (1999)
- Employment Non-Discrimination Act of 1999, H.R. 2355, 106th Cong. (1999)
- Employment Non-Discrimination Act of 1999, S. 1276, 106th Cong. (1999)

2000s

- Civil Rights Amendments Act of 2001, H.R. 217, 107th Cong. (2001)
- Employment Non-Discrimination Act of 2001, H.R. 2692, 107th Cong. (2001)
- Employment Non-Discrimination Act of 2002, S. 1284, 107th Cong. (2001)
- Civil Rights Amendments Act of 2003, H.R. 214, 108th Cong. (2003)
- Employment Non-Discrimination Act of 2003, S. 1705, 108th Cong. (2003)
- Employment Non-Discrimination Act of 2003, H.R. 3285, 108th Cong. (2003)
- Civil Rights Amendments Act of 2005, H.R. 288, 109th Cong. (2005)
- Employment Non-Discrimination Act of 2007, H.R. 2015, 110th Cong. (2007)
- Employment Non-Discrimination Act of 2007, H.R. 3685, 110th Cong. (2007)
- Employment Non-Discrimination Act of 2009, H.R. 3017, 111th Cong. (2009)
- Employment Non-Discrimination Act of 2009, S. 1584, 111th Cong. (2009)

2010s

- Employment Non-Discrimination Act, H.R. 1397, 112th Cong. (2011)
- Employment Non-Discrimination Act of 2011, S. 811, 112th Cong. (2011)
- Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013)
- Employment Non-Discrimination Act of 2013, H.R. 1755, 113th Cong. (2013)
- Equality Act, H.R. 3185, 114th Cong. (2015)
- Equality Act, S. 1858, 114th Cong. (2015)
- Equality Act, H.R. 2282, 115th Cong. (2017)
- Equality Act, S. 1006, 115th Cong. (2017)