

15-3775

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MELISSA ZARDA, co-independent executor of the estate of Donald Zarda,
WILLIAM ALLEN MOORE, JR., co-independent executor of
the estate of Donald Zarda,
Plaintiffs-Appellants,
—against—

ALTITUDE EXPRESS, INC., doing business as SKYDIVE LONG ISLAND,
RAY MAYNARD,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK, HON. JOSEPH BIANCO, JUDGE

**BRIEF OF THE LEGAL AID SOCIETY AS *AMICUS CURIAE*
IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 26.1 and 29(c)(1) of the Federal Rules of Appellate Procedure, *amicus curiae* The Legal Aid Society states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

STATEMENT OF INTEREST¹

The Legal Aid Society (“Legal Aid”) is the nation’s oldest and largest private not-for-profit organization, providing free legal services to low-income individuals and families for over 140 years. Its more than 1,100 attorneys represent clients throughout New York City in over 300,000 matters annually. Accordingly, Legal Aid is uniquely positioned to provide guidance to the Court on economic issues affecting the marginalized.

Additionally, in 2011, Legal Aid started its LGBT Law and Policy Initiative to combat poverty and homelessness among lesbian, gay, bisexual (“LGB”), and transgender people. Through that initiative, along with its Juvenile Rights Practice, which, *inter alia*, represents children in the majority of New York City abuse and neglect proceedings, as well as its Civil/Employment Law Unit, Legal Aid assists and represents individuals who have experienced discrimination based on their sexual orientation. Across its legal practices, Legal Aid has represented members of the LGB (or “gay”) community in thousands of cases and has served as counsel, or appeared as *amicus*, in cases pertaining to gender and sexuality.

¹ No party’s counsel authored this brief in whole or in part; no party or party’s counsel contributed money intended to fund preparing or submitting this brief; and no person other than *amicus curiae*, its members, or its counsel, contributed money intended to fund preparing or submitting this brief. See FED. R. APP. P. 29(a)(4)(E).

Legal Aid has seen first-hand the impact that sexual orientation discrimination has on low-income workers, including gay people.

Amicus thus brings critical perspective and decades of experience to bear on the question whether Title VII provides protection to individuals who experience sexual orientation discrimination. Should the Court believe it would benefit from oral argument by *amicus*, Legal Aid would be happy to oblige.² This Court granted leave for filing *amici curiae* briefs in its May 25, 2017 order³; additionally, Appellants have consented to the filing of this brief, and Appellees have stated that they will not submit any opposition.⁴

² See FED. R. APP. P. 29(a)(8).

³ Order, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir. May 25, 2017), ECF No. 271.

⁴ See FED. R. APP. P. 29(b)(2).

SUMMARY OF ARGUMENT

This Court should overrule *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), and hold that discrimination in the workplace on the basis of sexual orientation is illegal under Title VII of the Civil Rights Act of 1964.

1. It is well established, by the Supreme Court and this Court, that gender stereotyping discrimination is a form of discrimination on the basis of sex, and thus within Title VII's ambit. However, current precedent, articulated in *Simonton* and *Dawson*, carves out sexual orientation discrimination from the meaning of gender stereotyping, resulting in protection of LGB individuals if they are gender nonconforming (*e.g.*, effeminate gay men), but not if they are gender conforming (*e.g.*, masculine gay men).

This distinction is simply untenable. An increasing number of judges, as well as the Equal Employment Opportunity Commission ("EEOC"), now interpret Title VII as protecting all, rather than some, LGB individuals. This interpretation is based on the recognition that sexual orientation discrimination is a form of gender stereotyping, which is already prohibited. Moreover, as set forth below, social science and legal scholarship demonstrate that homophobia is invariably rooted in and driven by gender stereotyping and gender policing that begins in childhood.

2. Title VII was intended to protect marginalized groups from economic injuries caused by employment discrimination. This brief presents research demonstrating that LGB individuals are discriminated against because of their sexual orientation, and that such individuals therefore suffer lower rates of employment, lower wages, and higher rates of poverty compared to the public at large. Put simply, sexual orientation discrimination has caused widespread and profound economic harm. Therefore, interpreting Title VII to protect against sexual orientation discrimination furthers Title VII’s very purpose.

The Court now has a historic opportunity to overrule bad precedent and hold that Title VII protects all, not some, LGB individuals who are discriminated against in the workplace based on their sexual orientation.

ARGUMENT

I. UNDER TITLE VII, DISCRIMINATION BASED ON SEXUAL ORIENTATION CANNOT BE CARVED OUT FROM DISCRIMINATION BASED ON FAILING TO CONFORM TO GENDER STEREOTYPES.

As set forth in Title VII, it is an “unlawful employment practice for an employer . . . to discharge or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s . . . sex.”⁵ This Court’s jurisprudence has employed a

⁵ 42 U.S.C. § 2000e-2(a)(1).

strained reading of “sex” such that gender stereotyping is prohibited,⁶ but sexual orientation discrimination is not.⁷ Consequently, within the Second Circuit, all straight people—and some gay people—who appear to transgress superficial gender norms, are protected under Title VII, while other gay people are not. As the Supreme Court observed in *Price Waterhouse*, however, courts “need not leave [their] common sense at the doorstep when” interpreting Title VII.⁸ And common sense dictates that sexual orientation discrimination is rooted in the very gender stereotyping that Title VII prohibits.

There is no principled basis for distinguishing between discrimination based on sexual orientation and discrimination based on failure to conform to gender stereotypes, given that both rely on traditional notions of acceptable behavior for men and women. Increasingly, courts confronting the issue have recognized that this is the case. By contrast, this Court’s jurisprudence in *Simonton* and *Dawson* demonstrates that attempts to isolate sexual orientation from other forms of gender stereotyping simply defy logic. Further, sociological data support the notion that sexual orientation discrimination is a form of gender stereotyping discrimination.

⁶ See *Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 199-200 (2d Cir. 2017) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 231-33 (1989)).

⁷ See *Dawson*, 398 F.3d at 217-22; *Simonton*, 232 F.3d at 35.

⁸ 490 U.S. at 241.

Accordingly, the time has come to remedy the strained reading of “sex” in Title VII by recognizing that Title VII-cognizable sex discrimination based on gender stereotyping includes discrimination based on sexual orientation.

A. Courts And Other Arbiters Increasingly Recognize That Sexual Orientation Discrimination Is Rooted In Gender Stereotyping, And Is Therefore Protected By Title VII.

Federal judges and adjudicators at the administrative, district court, and appellate levels have increasingly concluded that employers that consider an employee’s sexual orientation in making selection, evaluation, or compensation decisions unlawfully “rel[y] upon sex-based considerations in coming to [their] decision[s].”⁹

In his concurrence in *Christiansen*, Chief Judge Katzmann, joined by Judge Brodie, identified at least three reasons why discrimination on the basis of an individual’s sexual orientation is part and parcel of the kind of sex-based discrimination that violates Title VII, including that “gay, lesbian, and bisexual individuals are treated less favorably because they do not conform to gender stereotypes, particularly stereotypes about the proper roles of men and women in romantic relationships.”¹⁰

⁹ *Price Waterhouse*, 490 U.S. at 242.

¹⁰ 852 F.3d at 202 (Katzmann, C.J., concurring).

While Legal Aid believes each of Chief Judge Katzmann’s rationales justifies the conclusion that sexual orientation is sex-based discrimination, this brief focuses on the above-quoted rationale, particularly because the work of legal theorists and practitioners on LGB issues, including Legal Aid, reinforces the point.¹¹ That is, discriminators do not differentiate between notions of how a “man” should act and how a “straight” man should act. Instead, sexual orientation discrimination “is often, if not always, motivated by a desire to enforce heterosexually defined gender norms. In fact, stereotypes about homosexuality are directly related to our stereotypes about the proper roles of men and women.”¹²

As observed in the *Christiansen per curiam*, “gay, lesbian, and bisexual individuals do not have *less* protection under *Price Waterhouse* against traditional gender stereotype discrimination than do heterosexual individuals.”¹³ Accordingly, to the extent that, as the concurrence acknowledged, “homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus,”¹⁴

¹¹ See Section I.C, *infra*.

¹² *Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring) (quoting *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002)).

¹³ *Id.* at 200-01.

¹⁴ *Id.* at 205 (Katzmann, C.J., concurring) (quoting *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255 (D. Conn. 2016)).

it is clear there is no defensible distinction between sexual orientation discrimination and other discrimination based on gender stereotyping.

When recently confronted with the question now before this Court, the Seventh Court overturned three decades of contrary authority and held that “discrimination on the basis of sexual orientation is a form of sex discrimination.”¹⁵ As in the *Christiansen* concurrence, one of the Seventh Circuit’s reasons for so holding was that there is no difference between sexual orientation discrimination and other gender stereotyping.¹⁶ The Court recognized that the plaintiff-appellant, “represents the ultimate case of failure to conform to the female stereotype (at least as understood in a place such as modern America, which views heterosexuality as the norm and other forms of sexuality as exceptional): she is not heterosexual.”¹⁷ Accordingly, while a panel of the Seventh Circuit characterized “the line between a gender nonconformity claim and one based on sexual orientation as gossamer thin,” the Court, sitting en banc, concluded “that it does not exist at all.”¹⁸

¹⁵ *Hively v. Ivy Tech. Cmty. Coll. of Ind.*, 853 F.3d 339, 341 (7th Cir. 2017) (en banc). The earliest case that *Hively* abrogated, *Ulane v. E. Airlines*, 742 F.2d 1081 (7th Cir. 1984), informed this Court’s outmoded decision in *Simonton*.

¹⁶ *Hively*, 853 F.3d at 346.

¹⁷ *Id.*

¹⁸ *Id.*

Furthermore, the EEOC also ruled that sexual orientation discrimination is protected under Title VII.¹⁹ Like the subsequent *Hively* decision and *Christiansen* concurrence, it agreed that “[s]exual orientation discrimination also is sex discrimination because it necessarily involves discrimination based on gender stereotypes.”²⁰ It noted that such “discrimination and harassment ‘[are] often, if not always, motivated by a desire to enforce heterosexually defined gender norms.’”²¹

Finally, a number of district courts, faced with interpreting “sex” under Title VII, have come out the same way as the *Christiansen* concurrence, the Seventh Circuit, and the EEOC and agreed that sexual orientation discrimination cannot be distinguished from gender stereotyping.²²

As one judge in the Southern District of New York explained, whether a “plaintiff has framed his complaint in terms of sexual orientation discrimination

¹⁹ *Baldwin v. Foxx*, E.E.O.C. Decision No. 0120133080, 2015 WL 4397641, at *5 (July 15, 2015).

²⁰ *Id.* at *7.

²¹ *Id.* at *8 (quoting *Centola*, 183 F. Supp. 2d at 410).

²² See, e.g., *Boutillier*, 221 F. Supp. 3d at 270; *U.S. Equal Emp’t Opportunity Comm’n v. Scott Med. Ctr., P.C.*, 217 F. Supp. 3d 834, 841-42 (W.D. Pa. 2016); *Winstead v. Lafayette Cty. Bd. of Cty. Comm’rs*, 197 F. Supp. 3d 1334, 1346-47 (N.D. Fla. 2016); *Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015); *Centola*, 183 F. Supp. 2d at 410.

and not gender stereotyping discrimination is immaterial” given the “‘illogical’ and artificial distinction between gender stereotyping discrimination and sexual orientation discrimination.”²³

B. Second Circuit Precedent Has Created An Untenable Framework For Evaluating Claims Of Employment Discrimination Based On Sexual Orientation Distinct From Gender Stereotyping.

Currently, Second Circuit precedent dictates that individuals who face workplace discrimination for failing to conform to certain gender-based stereotypes are protected under Title VII, whereas those who face workplace discrimination because they are gay are not. This artificial distinction leads to baffling results, as is evident from the *Simonton* and *Dawson* decisions, in which the Second Circuit categorized the alleged evidence of discrimination as either relating to sexual orientation *or* gender stereotyping, when sexual orientation discrimination *is* gender stereotyping.

In *Simonton*, a panel of the Second Circuit voiced disgust at evidence that Simonton’s co-workers harassed him for being gay by, among other things, calling him a “faggot” and hanging posters stating that he “suffered from mental illness as

²³ *Philpott v. New York*, No. 16-cv-6778 (AKH), 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017); *cf. Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1159 (C.D. Cal. 2015) (applying Title VII principles in interpreting Title IX, and holding that the distinction between sexual orientation discrimination and gender stereotyping discrimination “is illusory and artificial”).

a result of ‘bung hole disorder.’”²⁴ Yet because the Court categorized such pejoratives as relating to sexual orientation only, the Court ruled that there was insufficient evidence of “discrimination based upon sexual stereotypes.”²⁵ In doing so, the Court ignored what other courts have since recognized—that the homophobic slurs in *Simonton*, are, at bottom, gendered forms of harassment.²⁶ Indeed, *Simonton*’s harassers would not have believed he was “disorder[ed]” and “suffered from mental illness”²⁷ if not for gender-based stereotypes about a man’s

²⁴ 232 F.3d at 35.

²⁵ *Id.* at 38.

²⁶ See, e.g., *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 870, 874-75 (9th Cir. 2001) (abusive words like “faggot” fell within Title VII “sex” protections as “closely linked to gender”); *Doe by Doe v. City of Belleville*, 119 F.3d 563, 593 n.27 (7th Cir. 1997) (“a homophobic epithet like ‘fag,’ for example, may be as much a disparagement of a man’s perceived effeminate qualities as it is of his perceived sexual orientation.”); *Henderson v. Labor Finders of Va., Inc.*, No. 3:12-cv-600, 2013 WL 1352158, at *1, *2, *5 (E.D. Va. Apr. 2, 2013) (“[A]s a result of the well-documented relationship between perceptions of sexual orientation and gender norms, gender-loaded language [like “faggot”] can easily be used to refer to perceived sexual orientation and vice versa”); *Couch v. Chu*, E.E.O.C. Appeal No. 0120131136, 2013 WL 4499198, at *8 (Aug. 13, 2013) (“the words ‘fag’ and ‘faggot’ are offensive, insulting, and degrading sex-based epithets historically used when a person is displaying their belief that a male is not as masculine or as manly as they are.”).

²⁷ *Simonton*, 232 F.3d at 35.

role in sexual relations.²⁸

When the Court reaffirmed *Simonton* in *Dawson*, it once again attempted analytical “calisthenics.”²⁹ Indeed, it struggled to categorize the hairdresser plaintiff’s “conflated” claims arising from her intersectional identity as a woman in a male-dominated industry, a woman who appeared masculine in contravention of femininity norms, and a lesbian in a heterosexual-dominated society.³⁰ As the Court observed, “[w]hen utilized by an avowedly homosexual plaintiff, . . . gender stereotyping claims can easily present problems for an adjudicator [because] . . . [s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”³¹ Instead of acknowledging that this “blur” represents the impossibility of separating sexual orientation discrimination and gender stereotyping discrimination, the Court labored to fit the facts within those categories, under *Simonton*’s flawed paradigm. It, thus, tried to parse whether the plaintiff’s colleagues called her “Donald”

²⁸ See Nancy Levit, *Theorizing and Litigating the Rights of Sexual Minorities*, 19 Colum. J. Gender & L. 21, 49-50 (2010) (“For gay men and lesbians, sexual orientation was originally medicalized as a mental disorder It was not until 1986 . . . that this category was finally removed from the DSM-III-R.”).

²⁹ See *Hively*, 853 F.3d at 350 (“It would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation.’”).

³⁰ *Dawson*, 398 F.3d at 217.

³¹ *Id.* at 218 (quotations omitted).

because of “her masculine appearance” or because of “her sexual orientation,” as though discriminators so differentiate.³² But such analyses contravene *Price Waterhouse*, which held that employers may not rely on *any* stereotypes about how a woman should behave, whether it be maintaining a sufficiently feminine appearance or dating men instead of women.³³

As *Simonton* and *Dawson* demonstrate, artificial distinctions between sexual orientation discrimination and other examples of discrimination based on gender stereotyping prove feeble analytical tools for resolving employment discrimination claims. Current precedent creates an irrational distinction between LGB individuals who do not conform to gender stereotypes (and are protected) and those who do conform to gender stereotypes (and are not). “Plaintiffs who ‘look gay’ succeed under Title VII while those merely known or thought to be gay do not.”³⁴

Current precedent also sends a disturbing message to LGB people in the workforce. Judge Rosenbaum’s dissent in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), aptly noted the problem of construing Title VII to

³² *Id.* at 222.

³³ *See* 490 U.S. at 251.

³⁴ Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 *Am. U. L. Rev.* 715, 766 (2014).

prohibit gender stereotyping but not sexual orientation discrimination. As explained therein, such a construction:

protects women who act or dress in ways that the employer perceives as gay, because that behavior fails to conform to the employer’s view of how a woman should act. But it allows employers to freely fire women that the employer perceives to be lesbians—as long as the employer is smart enough to say only that it fired the employee because it thought that the employee was a lesbian, without identifying the basis for the employer’s conclusion that she was a lesbian. It cannot possibly be the case that a lesbian who is private about her sexuality—or even a heterosexual woman who is mistakenly perceived by her employer to be a lesbian—can be discriminated against by the employer because she does not comport with the employer’s view of what a woman should be, while the outwardly lesbian plaintiff enjoys Title VII protection.³⁵

Such a framework cannot stand. This Court can now account for “the changing legal landscape that has taken shape in the nearly two decades since *Simonton* issued” and formally recognize that gender stereotyping discrimination encompasses sexual orientation discrimination.³⁶ It should recognize that “if 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*

³⁵ See 850 F.3d at 1267 (Rosenbaum, J., dissenting).

³⁶ *Christiansen*, 852 F.3d at 202 (Katzmann, C.J., concurring).

attracted to men, they have made out a cognizable sex discrimination claim.”³⁷

C. Childhood Bullying And Other Real World Evidence Demonstrate That Sexual Orientation Discrimination Is Rooted In Gender Stereotyping.

It is clear to Legal Aid from its extensive experience in this area, as well as from the work of legal theorists, social scientists, and other practitioners familiar with LGB issues, that sexual orientation discrimination is one form that gender stereotyping takes. But despite significant scholarship in this area,³⁸ the jurisprudence did not immediately follow. By examining how homophobia operates in children and young adults, however, the extent to which sexual

³⁷ *Id.* at 206 (emphasis added).

³⁸ See, e.g., Edward Stein, *Evaluating the Sex Discrimination Argument for Lesbian and Gay Rights*, 49 UCLA L. Rev. 471, 498 (2001) (“The sociological claim is that laws that discriminate on the basis of sexual orientation disadvantage women as well as lesbians, gay men, and bisexuals because these laws perpetuate a social system in which women play different social roles than men. The theoretical claim is that these laws are justified by sexism.”); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. Pa. L. Rev. 1, 98 (1995) (“[E]very sexual biological fact is meaningful only within a gendered frame of reference”); Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. Rev. 197, 219 (1994) (“Laws that discriminate against gays rest upon a normative stereotype: the bald conviction that certain behavior—for example, sex with women—is appropriate for members of one sex, but not for members of the other sex.”); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 Wis. L. Rev. 187, 187 (1988) (“[C]ontemporary legal and cultural contempt for lesbian women and gay men serves primarily to preserve and reinforce the social meaning attached to gender”).

orientation discrimination is rooted in gender stereotyping becomes more obvious.

For one thing, homophobic bullying begins in early childhood, long before puberty or the emergence of sexuality. Even before children may recognize their own sexual orientation, their peers use homophobic slurs to police behavior according to gender norms. As social science research confirms, in the elementary school years, “children learn and invest in the rules of normative masculine and feminine performance” and then “learn to use these social norms to police one another and battle for social position.”³⁹ That is, “elementary schools are, in fact, significant social contexts for the gender socialization of children.”⁴⁰ Children learn “how to be a ‘boy’ or ‘girl’” and, what’s more, they “learn to interpret and enforce social rules for ‘correct’ gender expression” as “shaped by . . . heterosexual relationships and desire.”⁴¹ Because bullied children are too young to engage in same-sex sexual relationships, “[b]oys’ regular misogynistic teasing and sexual harassment of girls, girls’ verbal policing of one another’s appearance and sexual reputations, and boys’ frequent homophobic teasing are examples of verbal aggression that . . . police the boundaries of acceptable gender,” not sexual

³⁹ Melissa J. Smith *et al.*, *Binaries and Biology: Conversations with Elementary Education Professionals After Professional Development on Supporting Transgender Students*, 80 *The Educ. F.* 34, 37 (2016).

⁴⁰ *Id.* (citations omitted).

⁴¹ *Id.*

orientation.⁴²

Such school-aged bullying is “deeply entrenched in the perpetuation of cultural norms and values—significantly, those norms that require a fixed relationship between (hetero) gender, sex and sexuality and the maintaining of ‘gender coherence’ through this ‘constellation.’”⁴³ “Those who most successfully conform to gender expectations are ‘celebrated’ in their peer groups and in school culture,” whereas “[y]oung people who are viewed as having an inadequate gender performance or gender characteristics or a gender identity not normatively associated with their biological sex are more violently and publically ‘marked,’ and denied access to social power and popularity.”⁴⁴

Gender-stereotyped bullying continues into adolescence as sexuality emerges and young adults develop a sexual orientation. According to a 2012 survey of more than 10,000 Lesbian, Gay, Bisexual and Transgender (“LGBT”)-identified youth ages 13-17, LGBT youth are more than two times as likely as non-LGBT youth to say they have been verbally harassed and called names, and

⁴² Elizabeth Payne *et al.*, *LGBTQ Kids, School Safety, and Missing the Big Picture: How the Dominant Bullying Discourse Prevents School Professionals from Thinking about Systemic Marginalization or . . . Why We Need to Rethink LGBTQ Bullying*, 1 QED: A J. in GLBTQ Worldmaking 1, 21 (2013).

⁴³ *Id.*

⁴⁴ *Id.* at 22.

physically assaulted, kicked, or shoved at school.⁴⁵ Sadly, 92% of LGBT youth “say they hear negative messages about being LGBT.”⁴⁶ Twenty-one percent of LGBT youth identified school bullying as the most important problem they face (with 26% most worried about non-accepting families), while their peers worry about grades and college.⁴⁷ But such bullies may not even know the sexual orientation of their victims. Rather, “many youths do not disclose their sexual orientations or gender identities” as a result of “high levels of homophobic reprisal” including from peers, parents, and other authority figures.⁴⁸

Perhaps it is not surprising then that, “a majority of peer-to-peer aggression in U.S. public schools is some form of *gender policing*,”⁴⁹ and student victims of LGBT harassment “are often targeted for ‘failing to conform to stereotypical

⁴⁵ *Growing Up LGBT in America*, Human Rights Campaign, at 16, available at <http://www.hrc.org/youth-report> (last visited June 23, 2017). This is the largest known sample of LGBT youth, and drew responses from every region of the country and many social, cultural, ethnic, and racial backgrounds.

⁴⁶ *Id.* at 18.

⁴⁷ *Id.* at 2.

⁴⁸ Angela Irvine, “We’ve Had Three of Them”: Addressing the Invisibility of Lesbian, Gay, Bisexual and Gender Non-Conforming Youths in the Juvenile Justice System, 19 Colum. J. of Gender & L. 675, 677 (2010).

⁴⁹ Payne, *supra* note 42 at 25-26 (emphasis in original).

notions of masculinity and femininity.”⁵⁰ Specifically, “overt acts of violence against LGBTQ youth (or those who are perceived to be) are . . . explicit effects of heteronormative school cultures that . . . privilege idealized (hetero) gender performances and create social benefits for peer-to-peer policing of non-normative sexualities and genders.”⁵¹

Even those of us who are many years removed from school may be familiar with the poignant depiction of this very concept from the 2017 Academy Awards’ Best Picture, “Moonlight.” In the film, a coming-of-age story of a young, gay man, the protagonist faces intense homophobic bullying and questions about his sexuality, at an age even before he identifies as gay, because he is perceived as “soft.” In an interview about the film’s themes, playwright Tarell Alvin McCraney, whose play the film is based upon, explained: “if we look at all real homophobia, it’s anti-feminism. It’s really misogyny dressed up, or pointed at men. What is the term in which we denigrate men for being homosexual? It is that

⁵⁰ Melissa J. Smith *et al.*, *Educator Evaluations of School Climate for LGBTQ Students: A Reiteration of the Bullying Discourse in 5 LGBTQ Voices in Education: Change the Culture of Schooling* 73, 73 (2015).

⁵¹ *Id.* at 74 (citation omitted).

they're a 'girl' or they're weaker.”⁵² Accordingly, “patterns of targeting indicate that youths’ understanding (and marking) of their LGBTQ and gender nonconforming peers is not ‘based solely on sexual orientation, but rather from judgments about perceived tendencies to engage in forms of expression that run counter to gender conventions.’”⁵³ It is, thus, the case that, “acts of LGBTQ harassment are ‘reiterations of the dominant order’ that normalize the marginalization of students who do not conform or meet the standards of hegemonic gender in some way.”⁵⁴

Childhood bullying dynamics demonstrate that sexual orientation discrimination relies on gender stereotype discrimination that extends into adulthood.⁵⁵ “Gender norms start at an early age. The result is gay men and

⁵² HRC Staff, *Coming of Age: Creators of Golden Globe Winner “Moonlight” Discuss Bullying, Masculinity*, Human Rights Campaign (Jan. 9, 2017), available at <https://tinyurl.com/y7dmvc46> (last visited June 25, 2017).

⁵³ Payne, *supra* note 42 at 22 (quotation omitted).

⁵⁴ *Id.* at 25 (quotation omitted).

⁵⁵ See Zachary A. Kramer, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII*, 2004 U. Ill. L. Rev. 465, 486-97 (2004) (discussing the nature of gender stereotypes in gay people); Anthony E. Varona *et al.*, *En/gendering Equality: Seeking Relief Under Title VII Against Employment Discrimination Based on Sexual Orientation*, 7 Wm. & Mary J. Women & L. 67, 72-73 (2000) (“[G]ay people, simply by identifying themselves as gay, are violating the ultimate gender stereotype—heterosexual attraction.”).

women are often discriminated against because of rejection of the traditional male and female roles.”⁵⁶ As students move from the schoolyard to the workplace, employment discrimination takes the place of such bullying.⁵⁷

In sum, gender stereotyping is deeply embedded in homophobic bullying from an early age, even before sexuality is in play. Later on, gender stereotyping remains at the core of homophobic workplace discrimination. No matter how gender conforming a gay employee may otherwise be, gender stereotyping is bound up inextricably with the homophobic discrimination he or she may face. Because sexual orientation discrimination inherently involves gender stereotyping, which is already prohibited under Title VII as discrimination “because of . . . sex,” it follows that this Court should also recognize that sexual orientation discrimination is prohibited under Title VII.

⁵⁶ Major Velma Cheri Gay, *50 Years Later ... Still Interpreting the Meaning of “Because of Sex” Within Title VII and Whether It Prohibits Sexual Orientation Discrimination*, 73 A. F. L. Rev. 61, 98 (2015).

⁵⁷ See Ken Corbett, *Faggot=Loser*, 2 Studies in Gender and Sexuality 3, 3-28 (2001) (discussing how homophobic harassment is equally rooted in definitions of masculinity as gay fear); Michael S. Kimmel, *Masculinity as Homophobia: Fear, Shame, and Silence in the Construction of Gender Identity*, 33 Readings For Diversity and Social Justice, 213-19 (2001) (same). See Section II.B, *infra* for a discussion of sexual orientation discrimination in the workplace.

II. INTERPRETING TITLE VII TO PROTECT AGAINST SEXUAL ORIENTATION DISCRIMINATION WOULD FURTHER TITLE VII'S LEGISLATIVE PURPOSE AND COMBAT THE ECONOMIC AND OTHER HARMS SUFFERED BY LGB PEOPLE.

Interpreting Title VII to prohibit discrimination on the basis of sexual orientation is also consistent with a goal of Title VII: the mitigation and prevention of the harmful economic effects that flow from employment discrimination. Through its decades of work with the LGB community, Legal Aid is well aware of the harmful effects that flow from workplace discrimination based on sexual orientation, including job insecurity, poverty, homelessness, depression, and suicide. Recognizing that Title VII includes LGB status will help to protect gay people and their families in accord with the statute's purpose.

A. Title VII Was Intended To Protect Certain Groups From The Harmful Economic Effects That Flow From Employment Discrimination.

One goal for Title VII was to address poverty caused by workplace discrimination. Congress passed the Civil Rights Act of 1964, and Title VII therein, to create a level playing field for all Americans in areas of employment,

education, housing, and elsewhere.⁵⁸

As Title VII's legislative history shows, Congress recognized the economic harms caused by employment discrimination, including pervasive and deep-seated poverty, and it resolved to combat those harms by enacting Title VII.⁵⁹

Moreover, in interpreting Title VII, the Supreme Court has long emphasized that Title VII “deals” with the economic harm to certain groups that employment discrimination causes.⁶⁰ It explained that Title VII is fundamentally concerned with the “*consequences*” of employment discrimination, “not simply the motivation.”⁶¹

⁵⁸ See generally 42 U.S.C. § 2000e *et seq.* (July 2, 1964); see also H.R. Rep. No. 88-914, pt. 1, at 3 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2393 (General Statement) (declaring the intent of the Civil Rights Act of 1964 to be “general in application and national in scope” so as to “eradicat[e] significant areas of discrimination on a nationwide basis”).

⁵⁹ See, e.g., H.R. Rep. No. 88-914, pt. 2, at 102 (1963), as reprinted in 1964 U.S.C.C.A.N. 2391, 2514-15 (Additional Views of Rep. McCulloch *et al.*) (“A nation need not and should not be converted into a welfare state to reduce poverty, lessen crime, cut down unemployment, or overcome shortages in skilled occupational categories. All that it needed is the institution of proper training programs and the elimination of discrimination in employment practices.”).

⁶⁰ See, e.g., *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 420 (1975) (“Title VII deals with legal injuries of an economic character occasioned by racial or other antiminority discrimination.”).

⁶¹ *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (emphasis added).

Furthermore, the EEOC's Regulations and Guidelines echo the goal of improving economic prosperity by eliminating discrimination, explaining that:

Congress enacted [T]itle VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life.⁶²

As explained below, research shows that LGB people experience workplace discrimination, which causes serious economic harm of the sort that Title VII is generally designed to prevent. Moreover, young people in the LGB community experience discrimination that hurts them economically and hinders their ability to reach their full potential as adults.

B. Sexual Orientation Discrimination Negatively Affects LGB Employment Opportunities And Overall Well Being.

Legal Aid has long fought the exacerbating influence of sexual orientation discrimination on poverty and homelessness within the LGB community. The pervasive discrimination against this group has negatively impacted the LGB community's job opportunities in measurable ways. In a 2011 study, a researcher sent 1,769 pairs of fictitious resumes to white-collar employers in seven states.⁶³

⁶² 29 C.F.R. § 1608.1.

⁶³ See Andras Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 Am. J. of Soc. 586, 601 (2011).

One resume in each pair listed experience in a gay community organization, while the other resume in the pair did not.⁶⁴ The study showed that *the “applicant” with the gay organization on his resume was 40% less likely* to receive a call for an interview.⁶⁵ The researcher thus concluded that “gay men encounter significant barriers in the hiring process because, at the initial point of contact, employers more readily disqualify openly gay applicants than equally qualified heterosexual applicants.”⁶⁶

This issue has not improved since 2011. In a 2015 study, the American Psychological Association found that 33% of LGBT adults reported being unfairly not hired for a job, compared to 20% of white men. A 2016 study showed that between 11% and 28% of LGB workers reported losing a promotion because of their sexual orientation.⁶⁷

Moreover, a negative synergy occurs where LGB people possess other economically and politically disfavored identities. For example, a 2015 study

⁶⁴ *Id.* at 597.

⁶⁵ *Id.* at 605 (emphasis added).

⁶⁶ *Id.* at 614.

⁶⁷ See Sejal Singh *et al.*, *Widespread Discrimination Continues to Shape LGBT People’s Lives in Both Subtle and Significant Ways*, Center for American Progress (May 2, 2017), available at <https://tinyurl.com/ybxbzttt> (last visited June 25, 2017).

showed that gay black workers earn less than the combined wage gaps for race and sexual orientation.⁶⁸ As the study's authors explained:

[The wage penalty suffered by gay blacks compared with white married men] is even larger than the sum of the within-race sexual orientation wage penalty (13.8%) and the racial wage penalty for gay black men (6.6%). This indicates the earnings penalties of black gay men are not simply the sum of their distinct minority sexual orientation and race penalties, but rather that there is a magnifying effect of double minority status penalizing black gay workers.⁶⁹

Moreover, this effect is “most pronounced for lower-income workers,” that is, those already struggling to make ends meet.⁷⁰

In addition to hindering LGB individuals' ability to secure employment and advance in their careers once employed, discrimination directed at this community has subtle, sometimes invisible effects that are equally damaging. For example, 69% of LGBT adults who experienced sexual orientation- or gender identity-based discrimination in the past year reported that the discrimination negatively affected their psychological wellbeing; 44% said it negatively affected their physical wellbeing; and 53% reported it negatively impacted their work environment.⁷¹

⁶⁸ See Jamie H. Douglas *et al.*, *The Sexual Orientation Wage Gap for Racial Minorities*, 54 *Indus. Relations* 59, 85-86 (2015).

⁶⁹ *Id.*

⁷⁰ *Id.* at 96.

⁷¹ See Singh, *supra* note 67.

Studies have also shown that mood and anxiety disorders have a particularly high incidence in the LGB community. In a meta-analysis of 25 studies on the prevalence of mental disorders in LGB people, researchers found higher incidence of suicidal behavior, mental disorder, and substance abuse in the LGB community than among heterosexuals.⁷² Although the researchers noted that more research was needed, they theorized that “the social hostility, stigma and discrimination that most LGB people experience is at least part of the reason for the higher rates of psychological morbidity observed.”⁷³

Although social attitudes toward the LGB community have improved in recent years, there is disturbing evidence that discrimination against this community remains strong and has forced some back into the closet. A 2014 Human Rights Campaign Study showed, for example, that 53% of LGBT workers hide their sexual orientation from co-workers.⁷⁴ A 2016 study concurred; while as many as 32% of LGB individuals who had not experienced discrimination in the

⁷² See Michael King *et al.*, *A Systemic Review of Mental Disorder, Suicide, and Deliberate Self Harm in Lesbian, Gay and Bisexual People*, 8 BMC Psychiatry 70 at *13 (Aug. 18, 2008), available at <https://tinyurl.com/y82ylc8b> (last visited June 25, 2017).

⁷³ *Id.* at *14.

⁷⁴ Deena Fidas *et al.*, *The Cost of the Closet and the Rewards of Inclusion*, Human Rights Campaign, at 9 (May 2014), available at <https://tinyurl.com/yb8wnsk5> (last visited June 25, 2017).

past year used “vague language when talking about relationships,” that percentage *rose to over 70%* for those who had experienced discrimination.⁷⁵ The same study reported that over one-fifth of LGBT workers had searched for a different job because their current work environment was not accepting of their sexual orientation; almost one in ten had left a job for that reason.⁷⁶

The effects of discrimination do not stop at how LGB individuals describe their professional relationships, but spread to the very way they speak, walk, and dress: 7% of those who had not reported discrimination said they changed the way they talk and walk to avoid discrimination; among those reporting discrimination in the past year, 39% and 27% reported changing their timbre and gait, respectively.⁷⁷ Fifty-four percent of respondents who had experienced discrimination in the past year were afraid to even speak about LGBT issues in social situations.⁷⁸ Even those who have not experienced discrimination first-hand typically suffer its effects through common perceptions of the gay community. As such, 24% of LGBT respondents who had not experienced discrimination also

⁷⁵ Singh, *supra* note 67.

⁷⁶ Fidas, *supra* note 74 at 22-23.

⁷⁷ Singh, *supra* note 67.

⁷⁸ *Id.*

avoided speaking about LGBT issues in social situations.⁷⁹ This data and Legal Aid's experience reveal that homophobia drives a vicious cycle, increasingly reducing this group's economic and political power: discrimination forces the LGB community back into the closet, diminishing its visibility and propensity to discuss LGB issues with those outside the community. If and when LGB individuals are discriminated against, even *after* conforming to most gender stereotypes, they can be, and have been, fired for continuing to violate the most sacred gender stereotype—attraction to the opposite sex.

C. Sexual Orientation Discrimination Exacerbates Poverty.

Unfortunately, LGB discrimination worsens poverty in the community, even as many harbor the misconception that the LGB community is one of disproportionate wealth and political power.⁸⁰ A goal of Legal Aid's work in this area is to dispel that common myth.

⁷⁹ *Id.*

⁸⁰ See *Romer v. Evans*, 517 U.S. 620, 636, 645-46 (1996) (Scalia, J., dissenting); Jeff Green, *LGBT Purchasing Power Near \$1 Trillion Rivals Other Minorities*, Bloomberg (July 20, 2016), available at <https://tinyurl.com/jzdaptl> (last visited June 25, 2017).

Indeed, the myth is far from true.⁸¹ As reported in 2013:

[A] quarter of bisexual women [were] poor (29.4%) and more than 1 in 5 lesbians [were] in poverty (22.7%), a rate higher than the poverty rate among heterosexual women (21.1%) Similarly, a greater percentage of gay (20.5%) and bisexual men (25.9%) fell at or below the federal poverty line than heterosexual men (15.3%).⁸²

Poverty in the LGB community has many effects, but a more pronounced one is pervasive food insecurity. A 2016 report found that “LGB adults are 1.36 times more likely than non-LGB adults of the same age to have participated in SNAP [(Supplemental Nutrition Assistance Program)] in the past year,” and for same-sex couples, the number jumps to 1.58 times more likely.⁸³

LGB youth are also disproportionately indigent and discriminated against. As the Williams Institute notes, and as Legal Aid’s experience confirms,

⁸¹ See, e.g., Rob Smith, *Opinion: The Bearable Whiteness of Being Gay*, InAmerica CNN Blogs (Feb. 2, 2012), available at <https://tinyurl.com/6nyus6k> (last visited June 25, 2017) (noting overrepresentation of affluent, white males in media depictions of LGB community).

⁸² M.V. Lee Badgett *et al.*, *New Patterns of Poverty in the Lesbian, Gay, and Bisexual Community*, The Williams Institute, at 9 (June 2013), available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf> (last visited June 25, 2017). Although these differences were not statistically significant, the authors believed that their data’s consistency with other data increased the likelihood that the data “represent[ed] meaningful patterns of greater vulnerability to poverty in the LGB community.” *Id.*

⁸³ Taylor N.T. Brown *et al.*, *Food Insecurity and SNAP Participation in the LGBT Community*, The Williams Institute, at 3 (July 2016), available at <http://williamsinstitute.law.ucla.edu/research/health-and-hiv-aids/lgbt-people-are-disproportionately-food-insecure/> (last visited June 25, 2017).

“[c]hallenging environments at home and at school contribute to an overrepresentation of LGBT youth in the child welfare system, the youth homeless population, and the juvenile justice system,”⁸⁴ which negatively affects LGB youths’ employment opportunities as adults and prevents many from escaping the poverty cycle.

Title VII’s protections have the potential to help remedy the impact of these wrongs once a young LGB person starts applying for jobs.⁸⁵

CONCLUSION

For the reasons articulated above, Legal Aid respectfully requests that this en banc Court overrule both *Simonton* and *Dawson*, which created an artificial and untenable distinction between discrimination based on sexual orientation and discrimination based on failure to conform to gender stereotypes. The stereotype

⁸⁴ Christy Mallory *et al.*, *The Economic Impact of Stigma and Discrimination Against LGBT People in Georgia*, The Williams Institute, at 52 (2017) available at <http://williamsinstitute.law.ucla.edu/wp-content/uploads/Economic-Impact-of-Discrimination-and-Stigma-against-LGBT-People-in-Georgia-FINAL-4.pdf> (last visited June 25, 2017).

⁸⁵ Emir Ozeren, *Sexual Orientation Discrimination in the Workplace: A Systematic Review of Literature*, 109 *Procedia Soc. & Behav. Sci.* 1203, 1212 (2014) (“The introduction of non-discrimination laws can be related to changes in specific workplace [behaviors,] . . . as well as to increases in overall tolerance and acceptance in the workplace”).

that a person should exclusively be attracted to members of the opposite sex *is* a gender stereotype. Legal theory and social science bear that out.

Moreover, employment discrimination against individuals on the basis of sexual orientation inflicts widespread harm. Contrary to the myth of a wealthy community with outsized political influence, many LGB individuals exist on society's fringes. But this need not continue. Recognizing that Title VII also protects the LGB community will go far towards remediating such wrongs.

Dated: August 3, 2017

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B), and this Court's June 19, 2017 order, ECF No. 289, because it contains 6,802 words, excluding exempted parts, as determined by the word-counting feature of Microsoft Word.

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CERTIFICATE OF SERVICE

The undersigned certifies that true and correct copies of this Brief of The Legal Aid Society as *Amicus Curiae* in Support of Plaintiffs-Appellants were served electronically on all counsel of record, who have consented to electronic service, on August 3, 2017.

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