

16-3592

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

—▶▶◀◀—
FREDERICK M. CARGIAN,

Plaintiff-Appellant,

v.

BREITLING USA, INC.,

Defendant-Appellee.

—▶▶◀◀—
On Appeal from the U.S. District Court for the Southern District of New York
Hon. George B. Daniels, Judge

BRIEF OF LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Lambda Legal Defense and Education Fund, Inc. (“Lambda Legal”) has no parent corporation(s), does not have shareholders, and does not issue stock.

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INTERESTS OF *AMICUS CURIAE*¹

Amicus curiae Lambda Legal is the nation's largest and oldest nonprofit legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender (LGBT) people and people living with HIV through impact litigation, education, and policy advocacy. Lambda Legal has served as counsel of record or *amicus curiae* in some of the most important cases regarding the rights of LGBT people and people living with HIV. *See, e.g., Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996). Lambda Legal also has striven to ensure employment fairness for LGBT people by serving as counsel of record or *amicus curiae* in litigation addressing the application of federal law to discrimination against LGBT individuals. *See, e.g., Magnusson v. Cty. of Suffolk*, No. 16-1876 (2d Cir.); *Christiansen v. Omnicom Grp., Inc.*, No. 16-748 (2d Cir.); *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir.); *Hively v. Ivy Tech Cmty. Coll.*, 830 F.3d 698 (7th Cir. 2016), *reh'g en banc granted, opinion vacated*, No. 15-1720, 2016 WL 6768628 (7th Cir. Oct. 11, 2016); *Evans v. Georgia Reg'l Hosp.*, No. 15-15234 (11th Cir.);

¹ Pursuant to Federal Rule of Appellate Procedure 29(c)(5) and Local Rule 29.1, counsel for *amicus* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011); *EEOC v. Scott Med. Health Ctr., P.C.*, No. 16-225, 2016 WL 6569233 (W.D. Pa. Nov. 4, 2016); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008).

Amicus files this brief, pursuant to Federal Rule of Appellate Procedure 29(a)(2). Plaintiff-Appellant and Defendant-Appellee consent to the filing of the brief.

ARGUMENT SUMMARY

Because the sex discrimination prohibition in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, encompasses discrimination on the basis of sexual orientation, this Court should reverse the district court’s holding to the contrary. *See Cargian v. Breitling USA, Inc.*, No. 15 Civ. 01084 (GBD), 2016 WL 5867445, at *4 (S.D.N.Y. Sept. 29, 2016).

In enacting Title VII, Congress flatly banned all discrimination in employment “because of . . . sex.” 42 U.S.C. § 2000e-2(a)(1). While some lower courts have hesitated to give these words their full meaning, the Supreme Court has not. Instead, the Supreme Court has broadly and consistently condemned “sex-based” discrimination in the workplace, recognizing that Title VII was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from

sex stereotypes.” *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 n.13 (1978)), *superseded by statute on other grounds*, 42 U.S.C. § 2000e-2(m).

This brief explains why Title VII’s sex discrimination prohibition encompasses discrimination on the basis of sexual orientation, and how court pronouncements to the contrary, like *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), and *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005), are not binding and should be disavowed. *Amicus* also explains why the Equal Employment Opportunity Commission’s (“EEOC”) decision in *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 16, 2015), holding that sexual orientation discrimination is sex discrimination, is entitled to *Chevron* deference and overrides this Court’s contrary precedent.

ARGUMENT

I. TITLE VII’S PROSCRIPTION AGAINST SEX DISCRIMINATION ENCOMPASSES SEXUAL ORIENTATION DISCRIMINATION.

For at least three reasons, an employee necessarily experiences discrimination “because of such individual’s . . . sex,” 42 U.S.C. § 2000e-2, when an employee is subjected to antigay discrimination. First, under a basic sex discrimination or “sex-plus” theory, such discrimination necessarily involves sex-based considerations because it treats a man who is attracted to men differently from a woman with the

exact same attractions. Title VII plainly does not permit such distinctions. Second, just as discrimination against an employee based on romantic involvement with someone of a different race has universally been recognized as race discrimination barred by Title VII, discrimination against an employee based on her attraction to someone of the same sex must be recognized as sex discrimination equally barred by that law. Finally, under a gender stereotyping theory, sexual orientation discrimination is sex discrimination because it rests on the stereotype that women are or should only be attracted to men, and that men are or should only be attracted to women.

**A. When Employers Discriminate Based On Sexual Orientation,
They Necessarily Consider An Employee’s Sex.**

Employment discrimination on the basis of sexual orientation inherently involves differential treatment based on sex, in violation of Title VII, because one cannot consider an individual’s sexual orientation without taking into account that individual’s sex. *See Baldwin*, 2015 WL 4397641, at *5 (“[S]exual orientation is inseparable from and inescapably linked to sex.”); *accord Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015). Conceptually, this is a straightforward formulation. The Court need only ask whether the employee would have faced discrimination if the employee had been of a different sex. *See Manhart*, 435 U.S. at 711 (articulating the controlling, yet “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) (quotation omitted); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983). If the employee would have been treated differently had they been of the other sex, then the discrimination was based on sex.

Numerous courts have ruled in favor of lesbian or gay Title VII plaintiffs, using this simple logic. *See, e.g., Isaacs v. Felder Servs., LLC*, 143 F. Supp. 3d 1190, 1194 (M.D. Ala. 2015) (“If a business fires Ricky because of his sexual activities with Fred, while this action would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.”) (alterations, citation omitted); *Hall*, 2014 WL 4719007, at *3; *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); *see also Videckis*, 150 F. Supp. 3d at 1161.

Simonton’s treatment of sexual orientation discrimination as distinct from sex discrimination is therefore untenable. Its conclusory declaration that “Title VII does not proscribe discrimination because of sexual orientation,” 232 F.3d at 36, did not acknowledge, much less apply, the controlling, yet “simple[,] test” under *Manhart* for determining whether discrimination is based on sex. 435 U.S. at 711 (quotation omitted). Under *Manhart*, courts need only to ask “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. *Id.*

A “sex-plus” analysis leads to the same conclusion. “Sex-plus” is a term for discrimination occurring not categorically against all members of one sex, but only those members sharing a certain trait (for instance, having young children), when members of the other sex who share that trait suffer no discrimination. Sex-plus discrimination is unquestionably barred by Title VII. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *cf. Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 119 n.9 (2d Cir. 2004) (“any meaningful regime of antidiscrimination law must encompass” sex-plus claims).

In *Phillips*, the Fifth Circuit held that an employer’s policy against hiring women with small children did not violate Title VII, even though the employer had no policy against hiring men with small children. *Phillips v. Martin Marietta, Inc.*, 411 F.2d 1, 2, 4, 7 (5th Cir. 1969), *rev’d*, 400 U.S. 542 (1971). The Supreme Court unanimously reversed in a terse, three-paragraph, *per curiam* opinion that could have been one sentence: “The Court of Appeals . . . erred in reading [Title VII] as permitting one hiring policy for women and another for men—each having pre-school-age children.” *Phillips*, 400 U.S. at 544.

The reasoning of *Phillips*, like that of *Manhart*, compels the conclusion that Title VII prohibits antigay discrimination, for employers may not have one hiring

policy for women (“you may date men”) and another for men (“you may not date men”). *See also Baldwin*, 2015 WL 4397641, at *5. *Simonton* thus fundamentally misapprehended the proper nature of the Title VII inquiry, which is *not* to ask whether the discrimination can colloquially be described with words that are not in the statute (*e.g.*, discrimination against mothers with small children, or discrimination against gays and lesbians), but instead whether the discrimination falls within the words that *are* in the statute, using the tests set forth by the Supreme Court.

In sum, because “allegations of sexual orientation discrimination [necessarily] involve sex-based considerations,” and because “sexual orientation is inseparable from and inescapably linked to sex,” Title VII prohibits sexual orientation discrimination. *Baldwin*, 2015 WL 4397641, at *5; *see also Videckis*, 150 F. Supp. 3d at 1161.

B. Discrimination Based On Same-Sex Relationships Is Analogous To Discrimination Based On Interracial Relationships, And Therefore Equally Violates Title VII.

It is impossible to reconcile this Court’s holding that discrimination based on an employee’s interracial marriage or interracial associations constitutes race discrimination with an argument that discrimination based on a worker’s same-sex intimate relationships is *not* sex discrimination. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), a case post-dating *Simonton* and *Dawson*, this Court held

for the first time that “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 (emphasis in original); *see also Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986); *Schroer v. Billington*, 577 F. Supp. 2d 293, 307 (D.D.C. 2008). The same principles of construction apply to determining what constitutes discrimination “because of race” and “because of . . . sex,” and thus should dictate the same treatment of relationships involving the enumerated traits in Title VII.

Simonton and *Dawson* cannot “be legitimately reconciled” with *Holcomb* and other Title VII cases holding that discrimination based on interracial associations is race discrimination. *Boutillier v. Hartford Pub. Schs.*, No. 3:13-cv-01303, 2016 WL 6818348, at *9 (D. Conn. Nov. 17, 2016). “The logic is inescapable: If interracial association discrimination is held to be ‘because of the employee’s own race,’ so ought sexual orientation discrimination be held to be because of the employee’s own sex.” *Id.* Because sexual orientation “could otherwise be named ‘intrasexual association,’” discrimination on that basis should receive the same legal treatment as the “virtually identical associational Title VII claims in the context of race discrimination.” *Id.*

Despite the sometimes considerable difference, historically and socially, among the kinds of discrimination prohibited under Title VII, the Supreme Court

has been clear that courts should treat discrimination under the enumerated traits the same, because the statute “on its face treats each of the enumerated categories exactly the same.” *Price Waterhouse*, 490 U.S. at 243 n.9; *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78 (rejecting the attempt to exclude all same-sex harassment from Title VII’s scope, noting that “we have rejected any conclusive presumption that an employer will not discriminate against members of his own race”); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998); *see also Williams v. Consol. Edison Corp. of N.Y.*, 255 F. App’x 546, 549 n.2 (2d Cir. 2007); *Videckis*, 150 F. Supp. 3d at 1161; *Isaacs*, 143 F. Supp. 3d at 1193-94. Any doubt about the fervor with which the Court interprets Title VII uniformly across the statute’s enumerated traits is resolved by *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986). The Court favorably cited cases holding employers liable for racially hostile work environments and reasoned that “Nothing in Title VII suggests that a hostile environment based on discriminatory *sexual* harassment should not be likewise prohibited.” *Id.* at 66 (emphasis in original).

This Court should follow *Holcomb*’s liberal construction of Title VII and “reject [the] restrictive reading of Title VII,” 521 F.3d at 139, employed by *Simonton* and *Dawson* by holding that Title VII protects employees from employment

discrimination based on their association with persons of a particular sex, just as it protects against discrimination based on interracial association.²

C. Employees, Including LGBT Employees, Are Protected From Discrimination Based On Nonconformity To Sex Stereotypes.

In 1989, the Supreme Court ruled in *Price Waterhouse*, 490 U.S. 228, that “[a]s for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they match[] the stereotype associated with their group.” *Id.* at 251. Lest any mystery remain, this Court has held “that adverse actions taken on the basis of gender stereotypes can constitute sex discrimination.” *Back* 365 F.3d at 130.³ Because a man who is attracted to men does not conform to gender stereotypes, it is untenable to suggest that Title VII does not cover discrimination based on this attraction.

² In the only post-*Baldwin* decision from a federal appeals court to address this issue, the Seventh Circuit recently expressed complete agreement with the analogy to interracial relationships, even while it declined to overrule prior precedent against Title VII coverage of sexual orientation discrimination. *See Hively*, 830 F.3d at 717 (“if Title VII protects from discrimination a white woman who is fired for romantically associating with an African-American man, then logically it should also protect a woman who has been discriminated against because she is associating romantically with another woman”).

³ While *Back* was brought under 42 U.S.C. § 1983, this Court made clear that its analysis was the same under Title VII.

1. A Man's Attraction To Men Indisputably Defies Sex Stereotypes.

Indisputably, attraction to men is a gender norm or stereotype about women. Discrimination and harassment against women who defy that stereotype is “motivated by a desire to enforce heterosexually defined gender norms.” *Baldwin*, 2015 WL 4397641, at *8 (citation omitted). Indeed, “[t]here is no more obvious form of sex stereotyping than making a determination that a person should conform to heterosexuality.” *Scott Med. Health Ctr.*, 2016 WL 6569233, at *6. As a district court within this Circuit recently recognized, “homosexuality is the ultimate gender non-conformity.” *Boutillier*, 2016 WL 6818348, at *10; *accord Hively*, 830 F.3d at 705 (“the quintessential gender stereotype . . . [is] that men should have romantic and sexual relationships only with women, and women should have romantic and sexual relationships only with men”). Given that sexual orientation discrimination necessarily rests on gender stereotypes, courts cannot coherently follow *Price Waterhouse* and still immunize sexual orientation discrimination under Title VII.

Indeed, this Court has freely conceded the presence of gender stereotyping in sexual orientation discrimination, *see Dawson*, 398 F.3d at 218 (“Stereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality.”) (citation omitted), even though it has also paradoxically and incorrectly maintained that such gender stereotyping may

not form the basis of a Title VII claim. *Id.* See also *Cargian*, 2016 WL 5867445, at *4.

Because this Court’s guidance calls for a distinction between stereotypes that “necessarily blur” together, *Dawson*, 398 F.3d at 218, its guidance is “inherently unmanageable.” *Boutillier*, 2016 WL 6818348, at *10. Unsurprisingly, therefore, courts have increasingly declined to follow this Court’s approach, recognizing instead that attempts to distinguish between sex discrimination and sexual orientation discrimination are impossible and indefensible under *Price Waterhouse*. See, e.g., *id.*; *Isaacs*, 143 F. Supp. 3d at 1194; *Boutillier v. Hartford Pub. Schs.*, No. 13-cv-1303, 2014 WL 4794527, *2 (D. Conn. Sept. 25, 2014); *TerVeer*, 34 F. Supp. 3d at 116; *Koren*, 894 F. Supp. 2d at 1038; *Heller*, 195 F. Supp. 2d at 1224; *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002); see also *Christiansen v. Omnicom Grp., Inc.*, No. 15-cv-3440, 2016 WL 951581, *14 (S.D.N.Y. Mar. 9, 2016); *Centola*, 183 F. Supp. 2d at 408. And while some courts still attempt to impose an illusory line between sexual orientation discrimination and sex discrimination, see, e.g., *Cargian*, 2016 WL 5867445, at *4, courts find it “difficult to discern” or draw this line, *Dawson*, 398 F.3d at 217, because the “line does not exist, save as a lingering and faulty judicial construct.” *Videckis*, 150 F. Supp. 3d at 1159.

Simply put, “[i]t is impossible to categorically separate ‘sexual orientation discrimination’ from discrimination on the basis of sex or from gender stereotypes,” because “to do so would result in a false choice.” *Videckis*, 150 F. Supp. 3d at 1160. “It is . . . a distinction without a difference.” *Scott Med. Health Ctr.*, 2016 WL 6569233, at *6. “[D]iscrimination on the basis of sexual orientation is, at its very core, sex stereotyping plain and simple; there is no line separating the two.” *Id.*

2. *Dawson’s Dicta Limiting The Types Of Sex Stereotyping Claims Is Incorrect.*

In *Dawson*, this Court stated in dicta that “[g]enerally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance.” 398 F.3d at 221 (citations omitted). But this limitation on sex stereotyping claims to two categories conflicts with this Court’s and the Supreme Court’s holdings, and should therefore be disavowed.⁴

For one, *Dawson* actually held that the plaintiff did not sufficiently prove sexual orientation discrimination, period, and thus affirmed summary judgment not only on her federal claims but also on her claims under state and local laws explicitly prohibiting “sexual orientation” discrimination. *See Dawson*, 398 F.2d at 213, 224-25. Any statement in *Dawson* that sexual orientation discrimination is not sex

⁴ *Amicus* focuses its sex stereotyping discussion on *Dawson*, because *Simonton* did “not reach the merits of” a possible sex stereotyping discrimination claim. *See Simonton*, 232 F.3d at 38; *see also Koke v. Baumgardner*, No. 15–cv–9673, 2016 WL 93094, *2 (S.D.N.Y. Jan. 5, 2016).

stereotyping discrimination, or not covered by Title VII, is dicta that does not bind this Court, as the obligation to follow prior decisions extends only to express holdings. *See Xiao Ji Chen v. U.S. Dep't of Justice*, 471 F.3d 315, 338 (2d Cir. 2006) (“Holdings—what is necessary to a decision—are binding. Dicta—no matter how strong or how characterized—are not.”) (citation, quotation omitted); *Ming Shi Xue v. BIA*, 439 F.3d 111, 121 (2d Cir. 2006).

Moreover, the behavior/appearance limitation in *Dawson* inappropriately narrows the universe of relevant gender norms to only those that Ann Hopkins was deemed to transgress in *Price Waterhouse*, despite that case’s declaration that Title VII was “intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” *Price Waterhouse*, 490 U.S. at 251. The “entire spectrum” phrase previously appeared in *Manhart*, which had a decidedly broad view of what constituted discrimination based on sex stereotypes. *See* 435 U.S. at 707 n.13. *Manhart* had nothing to do with behavior or appearance, and neither did the case from which *Manhart* borrowed the “entire spectrum” concept – *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971).

Other cases through Title VII’s history also reflect a broad understanding of sex stereotypes that the statute combats, including stereotypes about life choices about families and relationships. *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 33 (2d Cir. 1988) (refusing to credit “stereotype” that men are more often sole wage earners);

Pond v. Braniff Airways, Inc., 500 F.2d 161, 166 (5th Cir. 1974) (discrimination based on “stereotypical culturally-based concepts of the abilities of people to perform certain tasks because of their sex” violates Title VII); *cf. Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (holding statute rooted in stereotype that families depend on male breadwinners unconstitutional).

Dawson also conflicts with this Court’s own precedents. For example, *Back*, which is both an actual holding about what sex stereotyping is actionable and a careful examination of the history of sex stereotyping, correctly concluded that under a proper reading of *Price Waterhouse*, the “question [of w]hat constitutes a gender-based stereotype . . . must be answered in the particular context in which it arises, and without undue formalization.” *Back*, 365 F.3d at 119-20.⁵ *Back* cited a variety of precedents demonstrating that the legal bar on sex stereotyping discrimination always has been concerned with rules and exclusions that would dictate to women (whether working or not) whether they could be in a relationship and, if so, which kind; what their roles in their relationships should be; and what type of family structures they could establish consistent with their job obligations. *See Back*, 365 F.3d at 120-21, 130 (citations omitted). As a result, the *Back* court had little trouble

⁵ In *Back*, the plaintiff produced evidence that her employer denied her tenure, believing “that a woman cannot ‘be a good mother’ and have a job that requires long hours” or “that a mother who received tenure ‘would not show the same level of commitment she had shown because she had little ones at home.’” 365 F.3d at 120 (alterations omitted).

recognizing that the employer’s comments about the purported conflict between the plaintiff’s motherhood and her commitment to the university reflected the kind of stereotyping that takes no “special training to discern.” 365 F.3d at 120.

Finally, *Dawson*’s erroneous limitation on gender stereotyping claims has lamentably been read to give a carte blanche to employers who discriminate based on an employee’s nonconformity in sexual attraction, as that nonconformity may not be related to the employee’s behavior or appearance. *See, e.g., Kiley v. Am. Soc’y for Prevention of Cruelty to Animals*, 296 F. App’x 107, 109 (2d Cir. 2008); *Estate of D.B. v. Thousand Islands Cent. Sch. Dist.*, 2016 WL 945350, *8 (N.D.N.Y. Mar. 14, 2016) (focusing on the victim’s sexual orientation as “the critical fact,” stating “If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. If, on the other hand, the harassment consists of homophobic slurs directed at a heterosexual, then a gender-stereotyping claim by that individual is possible.”).

* * *

In sum, this Court should disavow *Dawson*’s dicta as it conflicts with controlling precedents and facilitates discrimination against gay litigants without a statutory basis. “Forcing an employee to fit into a gendered expectation—whether that expectation involves physical traits, clothing, mannerisms or sexual attraction—

constitutes sex stereotyping and, under *Price Waterhouse*, violates Title VII.” *Scott Med. Health Ctr.*, 2016 WL 6569233, at *6.

II. THE EEOC’S INTERPRETATION OF TITLE VII IN *BALDWIN* IS ENTITLED TO *CHEVRON* DEFERENCE.

The EEOC’s decision in *Baldwin* has simplified the Court’s task in addressing the question of whether the sex discrimination prohibition contained in Title VII encompasses discrimination on the basis of sexual orientation. Because *Baldwin* was rendered in a federal sector adjudication pursuant to a specific congressional grant of authority, and because its holding constitutes a reasonable interpretation of Title VII on an issue that is not directly and precisely addressed in the statute, deference to *Baldwin* is mandatory, as is the overruling of *Simonton*, 232 F.3d 33, and its progeny. See *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (“*Brand X*”).

A. *Baldwin* Satisfies “*Chevron* Step Zero.”

In the first instance, the EEOC’s interpretation of sex discrimination in *Baldwin* was made in a context, and via a method, that require this Court to apply the *Chevron* framework, because Congress granted adjudicative authority to the EEOC in federal sector cases. This initial inquiry—which asks whether an agency interpretation warrants *Chevron* analysis—is typically referred to as “*Chevron* Step Zero.” See Thomas W. Merrill & Kristin E. Hickman, *Chevron’s Domain*, 89 Geo. L.J. 833, 873 (2001). The interpretation of sex discrimination in *Baldwin* passes this

threshold, because Congress granted adjudicative authority to the EEOC in federal sector cases, and the decision was issued pursuant to that authority and is a carefully-reasoned ruling with the force of law.

The Supreme Court observed in 2013 that there is not a “single case in which a general conferral of rulemaking or adjudicative authority has been held insufficient to support *Chevron* deference for an exercise of that authority within the agency’s substantive field.” *City of Arlington v. F.C.C.*, 133 S. Ct. 1863, 1874 (2013). This standard, taken literally, would resolve the *Chevron* Step Zero inquiry favorably for *Baldwin*. *Baldwin* is an exercise of the adjudicative authority Congress gave to the EEOC in the substantive field of federal employment discrimination.

Congress gave the EEOC adjudicative and substantive rulemaking authority in federal sector cases. *See* 42 U.S.C. § 2000e-16 (“2000e-16”). Specifically, the EEOC has “the authority to enforce the provisions of subsection (a) [prohibiting discrimination] . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section.”⁶ *Id.* This type of language repeatedly has been held to be a sufficient delegation of interpretive power to warrant *Chevron* deference. *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 165 (2007); *see also Am. Hosp. Ass’n v.*

⁶ That this provision authorizes adjudications is fundamental: the basic definition of an “order” is the culmination of an “adjudication.” 5 U.S.C. § 551(7) (“‘adjudication’ means agency process for the formulation of an order”).

N.L.R.B., 499 U.S. 606, 609-10 (1991); *Kruse v. Wells Fargo Home Mortg., Inc.*, 383 F.3d 49, 59 (2d Cir. 2004).

1. *Baldwin* Satisfies The Delegation And “Force Of Law” Inquiries Under Step Zero.

Baldwin is eligible for *Chevron* deference under *United States v. Mead Corp.*, 533 U.S. 218 (2001), *Barnhart v. Walton*, 535 U.S. 212 (2002), and this Court’s subsequent precedents, which together indicate that an agency interpretation is eligible for *Chevron* deference where (1) there is a general delegation from Congress, and (2) the agency either engages in formal rulemaking or a formal adjudication, or acts with the force of law in a manner that “reflected sufficient agency consideration and application of expertise to merit *Chevron* deference.” *Cohen v. JP Morgan Chase & Co.*, 498 F.3d 111, 124 n.9 (2d Cir. 2007) (citing *Kruse*, 383 F.3d at 58–61). *Baldwin* easily meets both of the “general delegation” and “force of law” criteria.

The EEOC acted with the force of law because its interpretation applies on its face not only to the *Baldwin* parties but also to all federal executive agencies. *See* 2015 WL 4397641, at *10. The EEOC exercised this lawmaking authority, moreover, pursuant to its general congressional delegation to issue “rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities” to enforce the federal-sector sex-discrimination provision. 42 U.S.C. § 2000e-16(b).

2. *Baldwin* Is Eligible For *Chevron* Deference Because It Is A Carefully-Considered Decision Within The EEOC's Expertise.

Baldwin is also eligible for *Chevron* deference because it is a carefully-considered decision within the EEOC's expertise. A year after *Mead*, the Supreme Court listed five additional factors for courts to consider in assessing whether an agency's action satisfies the *Chevron* Step Zero inquiry: "the interstitial nature of the legal question, the related expertise of the Agency, the importance of the question to administration of the statute, the complexity of that administration, and the careful consideration the Agency has given the question over a long period of time." *Barnhart*, 535 U.S. at 222. *Baldwin* fares well under the *Barnhart* factors. While the lack of complexity of Title VII militates slightly against deference, the other factors clearly militate in favor: the sexual orientation coverage question is interstitial; the agency possesses relevant expertise; the legal analysis is thorough and reflects careful consideration; and the interpretation is important to the administration of the statute, in that the EEOC is charged with processing almost every charge of discrimination under Title VII.

B. The *Baldwin* Decision Is Not Only Reasonable But Persuasive.

Baldwin easily passes *Chevron* Steps One and Two, because Congress has not "directly spoken on the precise question at issue," *Nat. Res. Def. Council v. U.S. E.P.A.*, 808 F.3d 556, 569 (2d Cir. 2015) (citation, quotation omitted), and because

Baldwin is an eminently reasonable interpretation of Title VII's sex discrimination provision.

First, it is obvious that, in banning discrimination on the basis of sex, Congress did not *directly* address the *precise* question of whether that prohibition extended to discrimination on the basis of sexual orientation.

Second, *Baldwin* is an eminently reasonable interpretation of Title VII's sex discrimination prohibition, grounded in Supreme Court precedent. It properly refocused the coverage inquiry as turning on whether the discrimination can be deemed to be on the basis of sex under Supreme Court precedent, even though in common parlance it could also be called sexual orientation discrimination. *Baldwin*, 2015 WL 4397641, at *4. By characterizing the question as whether a man is discriminated against for a reason (attraction to men) that is not held against woman, or for violating a gender norm—that men should be attracted only to women, *id.* at **5-8, *Baldwin* reflects fidelity to Supreme Court precedent broadly interpreting Title VII's sex discrimination provision.

Baldwin rendered a permissible interpretation of sex-based discrimination as including sexual orientation discrimination by faithfully applying the sex-plus and sexual stereotyping principles in Supreme Court decisions and by properly

analogizing to discrimination based on interracial relationships recognized by this Court and every other to consider the question.⁷

C. Under *Brand X*, *Baldwin* Is Controlling Precedent, Irrespective Of Contrary Circuit Precedent.

Because *Brand X*, 545 U.S. 967, generally mandates the overruling of a case that is at odds with an agency interpretation entitled to *Chevron* deference, *Brand X* compels this Court to overrule *Simonton*. Indeed, both *Baldwin* and *Simonton* arose under the federal sector discrimination provision in 2000e-16.

1. Pursuant To *Brand X*, *Simonton* Is Overruled By *Baldwin*.

Brand X holds that a prior ruling of a lower federal court will take precedence over a contrary subsequent agency decision receiving *Chevron* deference *only* if the prior judicial ruling was based on the statute’s unambiguous language. 545 U.S. at 982; *see also Mhany Mgmt., Inc. v. Cty. of Nassau*, 819 F.3d 581, 618-19 (2d Cir. 2016) (applying *Brand X* to adopt more recent agency interpretation rather than two prior Second Circuit interpretations where “we did not hold that the statute was unambiguous”). *Simonton* did not rest on Title VII’s unambiguous language, and therefore must yield to *Baldwin*.

In immediate response to “*Simonton* argu[ing] that discrimination based on ‘sex’ includes discrimination based on sexual orientation,” the *Simonton* court did

⁷ *See Baldwin*, 2015 WL 4397641, at **6-7 (citing, *inter alia*, *Holcomb*, 521 F.3d at 138, and *Parr*, 791 F.2d at 892).

not turn to the statute’s language at all, but instead noted that “[a]dmittedly, we have ‘little legislative history to guide us in interpreting the Act’s prohibition against discrimination based on “sex.”’” *Simonton*, 232 F.3d at 35 (citation omitted). Then, the court inappropriately weighed Congress’s inaction on various subsequent bills. *Id.* There is no discussion of what discrimination “because of ... sex” means, let alone why it would unambiguously exclude antigay discrimination. Thus, the “unambiguous language of the statute” exception to *Brand X* does not apply, and *Brand X* requires that this Court follow *Baldwin* and overrule any case, like *Simonton*, to the contrary.

2. There Is No Relevant Difference In The Scope Of 2000e-2 And 2000e-16.

After accepting the EEOC’s determination that sexual orientation discrimination is necessarily discrimination “based on . . . sex” under the federal sector 2000e-16 provision, the Court should assess whether any difference in the Title VII provision at issue in this case, 42 U.S.C. § 2000e-2 (“2000e-2”) (discrimination “because of . . . sex”) permits a different result. Of course, no differential treatment can be justified, as reflected by this Court’s reliance on *Simonton* in its dicta about Title VII’s reach in a non-federal sector case under 2000e-2. *See Dawson*, 398 F.3d 211. Such equating of the two standards is correct: courts universally find the two discrimination bans to be substantively identical in scope. *See Bundy v. Jackson*, 641 F.2d 934, 942 (D.C. Cir. 1981); *Page v. Bolger*,

645 F.2d 227, 233 (4th Cir. 1981) (*en banc*); *Jordan v. Clark*, 847 F.2d 1368, 1373 n. 3 (9th Cir.1988); *Thomas v. Miami Veterans Med. Ctr.*, 290 F. App'x 317, 319 (11th Cir. 2008); *Mosley v. United States*, 425 F. Supp. 50, 55 (N.D. Cal. 1977).

In sum, because *Baldwin's* interpretation is binding on this Court under *Chevron* and *Brand X*, and because the meaning of “sex” discrimination is identical under 2000e-16 and 2000e-2, this Court should hold that Title VII’s prohibition on sex discrimination encompasses sexual orientation discrimination in both federal and private sector cases.

III. THE COURT CAN AND SHOULD DISAVOW *SIMONTON AND DAWSON.*

Even if this Court were to decline to apply *Chevron*-level deference to *Baldwin*, it should still disavow *Simonton's* and *Dawson's* analysis of sexual orientation under Title VII, because *Simonton's* holding and *Dawson's* dicta on this issue were clearly incorrect, and because legal developments post-dating them have neutered any precedential value they might have had. While three-judge panels of this Court should “ordinarily” adhere to a prior panel’s holding, *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 171-72 (2d Cir. 2001), this general rule does not apply where, as here, subsequent legal developments at the Supreme Court, the EEOC, and the Second Circuit have rendered a prior panel’s decision hollow.

A. Three-Judge Panels May—And Sometimes Must—Overrule Prior Circuit Precedent

A three-judge panel of this Court may reject another panel’s decision when an intervening Supreme Court or Second Circuit *en banc* decision has explicitly or implicitly rejected the prior panel’s reasoning. *See New York v. Nat’l Serv. Indus., Inc.*, 460 F.3d 201, 207 (2d Cir. 2006); *Union of Needletrades, Indus. & Textile Emps. v. U.S.I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003); *see also Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) (three-judge panel may overrule prior Circuit precedent where “intervening Supreme Court decision casts doubt on the prior ruling”) (citation, quotation omitted). In overruling a prior panel’s decision, a new panel may also rely on Supreme Court precedent *pre-dating* the prior panel’s holding if, for example, a more recent, intervening Supreme Court decision lends new significance to the earlier Supreme Court precedent. *See Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir. 1992); *see also Local Union 36 v. N.L.R.B.*, 706 F.3d 73, 83 (2d Cir. 2013). To qualify as an intervening decision requiring rejection of a prior panel holding, the more recent decision “must have broken the link” upon which this Court premised its prior decision, or “undermined an assumption of that decision.” *Doscher*, 832 F.3d at 378 (alterations, citations, quotations omitted). “Even if the effect . . . is ‘subtle,’ it may nonetheless alter the relevant analysis fundamentally enough to require overruling prior, ‘inconsistent’ precedent.” *Id.* (citation omitted).

Three-judge panels have also overruled prior panel holdings to resolve inconsistencies among this Court’s precedents, *see Diebold Found., Inc. v. C.I.R.*, 736 F.3d 172, 183 n.7 (2d Cir. 2013); *United States v. Brutus*, 505 F.3d 80, 86 n.3, 87 n.5 (2d Cir. 2007); *Germain v. Conn. Nat’l Bank*, 926 F.2d 191, 193-94 (2d Cir. 1991), *rev’d on other grounds*, 503 U.S. 249 (1992), and to remedy significant, unforeseen consequences of prior panel rulings, *see Shipping Corp. of India v. Jaldhi Overseas Pte*, 585 F.3d 58, 67-69 (2d Cir. 2009); *see also United States v. Elbert*, 658 F.3d 220, 222-24 (2d Cir. 2011). Where panels reject a prior panel’s decision in the absence of intervening higher authority, they typically—though not invariably—indicate that their opinion was circulated, prior to filing, to some or all of the Court’s other judges, though they do not always disclose the extent of other judges’ agreement. *See, e.g., Shipping Corp. of India*, 585 F.3d at 67; *Burda Media, Inc. v. Viertel*, 417 F.3d 292, 298 n.5 (2d Cir. 2005); *see also In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 39-42 (2d Cir. 2006) (disavowing prior decisions without stating whether opinion was circulated to other judges).

The demonstrated willingness of three-judge panels to reconsider prior Circuit precedent has been particularly important to preserving the integrity of this Circuit’s case law, given that the Second Circuit “hears the fewest cases *en banc* of any circuit by a substantial margin.” Mario Lucero, *The Second Circuit’s En Banc Crisis*, 2013 *Cardozo L. Rev. de novo* 32, 33 (2013). Indeed, this Circuit so rarely hears cases *en*

banc that the practice has been described as “rusty and cumbersome” by one of its judges and has been denounced by others. *Id.* at 48-52 (quoting *Zhong v. U.S. Dep’t of Justice*, 489 F.3d 126, 139 (2d Cir. 2007) (Jacobs, C.J., dissenting from denial of rehearing *en banc*)). Were this Court to abandon its practice of allowing three-judge panels to correct erroneous Circuit precedent, while maintaining its longstanding reluctance to sit *en banc*, it would risk having its jurisprudence misaligned with the Supreme Court’s and in fundamental conflict with other authority—including its own later-issued rulings.

**B. Applying These Principles, A Three-Judge Panel Should
Reject *Simonton* And *Dawson*.**

Supreme Court decisions affording equal dignity to same-sex intimate relationships have fatally undermined *Simonton* and *Dawson* to the point that they should be deemed rejected. Indeed, cases like *Lawrence* and *Obergefell* “reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex relationships and the men and women who engage in them,” *Christiansen*, 2016 WL 951581, at *13, and reveal that the world in which *Simonton* and *Dawson* were decided no longer exists. *See Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 348 (E.D.N.Y. 2015) (“As the nation’s understanding and acceptance of sexual orientation evolve, so does the law’s definition of appropriate behavior in the workplace.”).

For example, *Simonton* predates even *Lawrence*, 539 U.S. 558, before which

it was thought that intimate relations between same-sex couples could be criminalized. The law's prior unequal treatment of same-sex and different-sex couples undermined the ability to make Title VII comparator arguments in the past. *See, e.g., Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999). Given that Supreme Court decisions since 2000 have equalized the treatment of interracial couples and same-sex couples, this Court's reasoning in *Holcomb* must apply to discrimination against an employee dating either someone of a different race or someone of the same sex.

Moreover, *Simonton's* and *Dawson's* sexual orientation analysis under Title VII is inconsistent with, and raises constitutional concerns under, this Court's ruling in *Windsor v. United States*, 699 F.3d 169 (2d Cir. 2012), *aff'd*, 133 S. Ct. 2675 (2013), adopting heightened constitutional protection for lesbians and gay men. *Id.* at 181-82.⁸ It would be untenable for this Court, having deemed sexual orientation classifications "quasi-suspect," *id.*, to perpetuate a judicial bar on otherwise viable sex-stereotyping and associational-gender claims *precisely because* they involve sexual orientation bias, or to again single out sex-discrimination claims by "avowedly homosexual" plaintiffs as a "problem." *Dawson*, 398 F.3d at 218; *see*

⁸ *Windsor's* test for heightened scrutiny remains the law in this circuit, *see Adkins v. City of New York*, 143 F. Supp. 3d 134, 139-40 (S.D.N.Y. 2015), even if when it affirmed this Court, the Supreme Court was not explicit about the application of heightened scrutiny. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 480-84 (9th Cir. 2014).

also *Estate of D.B.*, 2016 WL 945350, *8.⁹

Because *Simonton* and the dicta in *Dawson* relied on non-textual considerations to carve an exception in Title VII, they have also been abrogated by the Supreme Court’s more recent, repeated repudiation of non-textual interpretations of Title VII. See *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015) (court may not “add words to the law to produce what is thought to be a desirable result”); *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 175 (2011) (court’s preference for different rule “cannot justify departing from statutory text”); *Lewis v. City of Chicago, Ill.*, 560 U.S. 205, 215-17 (2010) (“It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”).

As explained, moreover, in Part I, *Simonton* and *Dawson* cannot “be legitimately reconciled” with this Court’s subsequent holding in *Holcomb*. See *Boutillier*, 2016 WL 6818348, at *9.

It does not matter if decisions like *Baldwin*, *Lawrence*, *Obergefell*, *Windsor*, *Holcomb*, and recent Supreme Court cases regarding statutory interpretation of Title VII did not necessarily address the precise question presented in this case. See

⁹ This Court’s straightforward application of *Price Waterhouse* in *Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009), which involved a stereotype about male-female sexual harassment, sharpens the tension between the Court’s general acceptance of sex-stereotyping doctrine and its suspicion of sex-stereotyping claims by gay plaintiffs, *Dawson*, 398 F.3d at 218.

Doscher, 832 F.3d at 378; *In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010). These cases have converged to cast an ineludible shadow of doubt upon *Simonton* and *Dawson*. And “[w]hen sufficient doubt exists,” this Court “must reconsider whether [a] precedent should continue as the law of the Circuit.” *Doscher*, 832 F.3d at 378.

Applying the foregoing principles, this Court can and should reject *Simonton*’s and *Dawson*’s discussion of sexual orientation claims under Title VII.

CONCLUSION

The judgment of the district court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 29(a)(5), Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(B), the brief contains 6,978 words.

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CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing Brief with the Clerk of the United States Court of Appeals for the Second Circuit via the CM/ECF system this 2nd day of February, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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