U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of
General Counsel

March 28, 2017

Catherine O'Hagan Wolfe, Clerk of Court
Office of the Clerk
U.S. Court of Appeals for the Second Circuit
Thurgood Marshall United States Courthouse
40 Foley Square
New York, NY 10007

RE: *Cargian v. Breitling USA, Inc.*, No. 16-3592

To the Clerk of the Court:

EEOC calls the Court's attention to the concurring opinion in *Christiansen v. Omnicom Group*, 2017 WL 1130183 (2d Cir. March 27, 2016) (Katzmann, C.J., concurring) and to the dissenting opinion in *Evans v. Georgia Regional Hospital*, 2017 WL 943925 (11th Cir. March 10, 2017) (Rosenbaum, J., dissenting in relevant part). *See* Fed.R.App.P.28(j).

In *Christiansen*, this Court held it lacked the power to reconsider Second Circuit precedent holding that Title VII does not prohibit sexual orientation discrimination. 2017 WL 1130183, at *2-4. Chief Judge Katzmann wrote a concurring opinion agreeing with the plaintiff and EEOC (as amicus) that sexual orientation discrimination constitutes discrimination "because of . . . sex" because: (1) it involves disparate treatment that would not occur "but for" the individual's sex; (2) it constitutes unlawful association discrimination; and (3) it is based impermissibly on gender stereotypes "about the proper roles of men and women in romantic relationships." *Id*. at *4. The concurrence stated "that when the appropriate occasion presents itself, it would make sense for the Court to revisit the central legal issue confronted in *Simonton* [*v. Runyon*, 232 F.3d 33 (2d Cir. 2000)] and *Dawson* [*v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005)], especially in light of the changing legal landscape." The concurring opinion supports EEOC's argument at pp. 4-22 of our amicus brief that this Court should reconsider its adverse precedent—en banc, if necessary—and hold that sexual orientation discrimination violates Title VII.

The *Evans* dissent also supports EEOC's argument. The panel held that circuit precedent foreclosed the plaintiff's argument that sexual orientation discrimination is cognizable under Title VII. *Evans*, 2017 WL 943925, at *5-6. Judge Rosenbaum dissented, concluding that *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), abrogated the precedent. *Id*. at *10-20 (Rosenbaum, J., dissenting in relevant part). In Judge Rosenbaum's view, a plaintiff alleging "that she has been discriminated against because she is a lesbian . . . necessarily alleges that she has been discriminated against because she failed to conform to the employer's image . . . that women should be sexually attracted to men only." *Id*. at *11.

Sincerely,

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CERTIFICATE OF SERVICE

I certify that all counsel of record are registered CM/ECF users and that I served them via the Court's CM/ECF system on March 28, 2017.

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