

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

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CASE NO. 17-13801-BB

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GERALD BOSTOCK,

Appellant,

v.

CLAYTON COUNTY, GEORGIA

Appellee.

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ON APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION  
CASE NO. 1:16-CV-01460

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**INITIAL BRIEF OF APPELLANT GERALD BOSTOCK**

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**CERTIFICATE OF INTERESTED PERSONS AND  
CORPORATE DISCLOSURE STATEMENT**

Pursuant to FRAP 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record verifies that those persons or entities listed below have or may have an interest in the outcome of this case:

Bostock, Gerald – Appellant/Plaintiff

Buckley Beal, LLP – counsel for Appellant

Buechner, William – counsel for Appellee

Clayton County, Georgia – Appellee/Defendant

Evans, Orinda D. – Senior Judge, United States District Court

Freeman Mathis & Gary, LLP - counsel for Appellee

Green, Brian – counsel for Plaintiff in underlying case

Hancock, Jack – counsel for Appellee

Heller, Martin B. – former counsel for Appellee

Indian Harbor Insurance Company (Insurer for Appellee)

Johnson, Walter E. (United States Magistrate Judge for the  
Northern District of Georgia)

Mew, Thomas – counsel for Appellant

Sutherland, Brian J. – counsel for Appellant

## **STATEMENT REGARDING ORAL ARGUMENT**

Counsel for Plaintiff-Appellant Gerald Bostock requests oral argument in this case. Counsel believes that oral argument would assist the Court in addressing the conflicts between this Court's decision in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017) and its decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) and the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

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**STATEMENT OF JURISDICTION**

This Court has jurisdiction under 28 U.S.C. § 1291 because this is an appeal of a final decision of the United States District Court for the Northern District of Georgia.

## **STATEMENT OF THE ISSUES**

1. Whether the District Court erred in dismissing Appellant's Complaint for sexual orientation discrimination under the authority of *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017), because *Evans* was wrongly decided on this point and conflicts with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) and this Court's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011).

## **STATEMENT OF THE CASE**

This case presents the opportunity for this Court to correct its erroneous recent decision in *Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248 (11th Cir. 2017), and clarify that discrimination based on an employee’s sexual orientation is indeed discrimination based on that employee’s sex and therefore violates Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e et seq. (“Title VII”). Plaintiff-Appellant Gerald Bostock alleges that his former employer, Defendant-Appellee Clayton County, violated Title VII by firing him because he is a gay male. He alleges sexual orientation discrimination and gender stereotype discrimination.<sup>1</sup> Because this Court incorrectly decided in *Evans* that the prohibition of sex discrimination in Title VII does not include discrimination based on sexual orientation, this Court must act to overrule *Evans* and reverse the decision of the District Court dismissing Mr. Bostock’s claim under Title VII.

### **I. COURSE OF PROCEEDINGS AND DISPOSITION BELOW**

Mr. Bostock filed this lawsuit *pro se* on May 5, 2016, alleging that Clayton County violated his rights under Title VII when it terminated his employment in

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<sup>1</sup> Mr. Bostock does not appeal the dismissal of his gender stereotype discrimination claim but, as set forth in the Argument section, the distinction between sexual orientation discrimination and gender stereotype discrimination is a distinction without a difference since, in either case, the employer has discriminated because of the employee’s sex.

November 2012. (Doc. 1, ¶¶ 1, 12-14.) Specifically, he alleges that Clayton County discriminated against him on the basis of his sexual orientation. (*Id.* at ¶¶ 13-14.) After Mr. Bostock secured counsel, he filed his First Amended Complaint on August 2, 2016 and his Second Amended Complaint on September 12, 2016. (Docs. 4, 10.) The Second Amended Complaint alleges that Clayton County discriminated against Mr. Bostock on the basis of his sexual orientation and also alleges gender stereotype discrimination. (Doc. 10 ¶¶ 17, 20-21, 23, 24-31.)

On September 26, 2016, Clayton County filed a Motion to Dismiss the Second Amended Complaint. (Doc. 13.) On November 3, 2016, the Magistrate Judge issued his Final Report and Recommendation, recommending that Mr. Bostock's complaint be dismissed with prejudice. (Doc. 16.) Mr. Bostock filed objections to the Report and Recommendation, to which Clayton County responded and Mr. Bostock replied. (Docs. 18, 19, 20.)

The District Court deferred ruling on the objections pending the outcome of this Court's decision in *Evans v. Georgia Regional Hospital*, 850 F.3d 1248 (11th Cir. 2017). (*See* Doc. 21.) On March 10, 2017, this Court issued its decision in *Evans*, in which a majority of the panel decided that Title VII's prohibition of sex discrimination does not include discrimination based on sexual orientation. 850 F.3d at 1255-57. This Court denied a petition for rehearing and rehearing en banc

On July 6, 2017. (Order dated July 6, 2017, per curiam). The next day, on July 7, 2017, the District Court adopted the Report and Recommendation and granted Clayton County's Motion to Dismiss. (Doc. 24.)

## **II. STATEMENT OF FACTS**<sup>2</sup>

Mr. Bostock is a gay male. (Doc. 10, ¶ 12). Mr. Bostock began working for Clayton County on or about January 13, 2003 (*id.* ¶ 11), and worked as the Child Welfare Services Coordinator assigned to the Juvenile Court of Clayton County (*id.* ¶ 13). His primary responsibility was the Court Appointed Special Advocate (“CASA”) program for Clayton County. (*Id.* ¶ 13.) During the over ten years Mr. Bostock worked for Clayton County, he received favorable performance evaluations and helped earned accolades for the Clayton County CASA program. (*Id.* ¶ 14.) Clayton County CASA was even awarded the established Program Award of Excellence by Georgia CASA in 2007. (*Id.*) Mr. Bostock also received recognition from National CASA for his work and served on the National CASA Standards and Policy Committee in or about 2011 through 2012. (*Id.*)

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<sup>2</sup> These are the facts as alleged in Mr. Bostock's Second Amended Complaint. Many of these facts are denied by Clayton County, but this Court reviews an order granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6) *de novo*. *Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). In assessing the sufficiency of a claim, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in the plaintiff's favor. *Montgomery Cty. Comm'n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1254 (11th Cir. 2015).

Beginning in January 2013, Mr. Bostock became involved with a gay recreational softball league called the Hotlanta Softball League. (Doc. 10 ¶ 15.) Mr. Bostock actively promoted Clayton County CASA to the softball league as a source of volunteer opportunities for league members. (*Id.* ¶ 16.)

In the months after Mr. Bostock joined the softball league, his participation in the league and his sexual orientation and identity were openly criticized by one or more people who had significant influence in Clayton County's decisionmaking. (Doc. 10 ¶ 17.) Shortly thereafter, in or around April 2013, Clayton County advised Mr. Bostock it was conducting an internal audit on the CASA program funds that Mr. Bostock managed. (*Id.* ¶ 18.)

Mr. Bostock never engaged in any improper conduct with regard to program funds under his custody or control, and he alleges that Clayton County initiated the audit as a pretext for discrimination based on his sexual orientation and failure to conform to gender stereotype. (Doc. 10 ¶¶ 19-20.) In fact, in May 2013, during a meeting with the Friends of Clayton County CASA Advisory Board at which Mr. Bostock's supervisor was present, at least one individual made disparaging comments about Mr. Bostock's sexual orientation and identity and his participation in the softball league. (*Id.* ¶ 21.)

On or about June 3, 2013, Clayton County fired Mr. Bostock. (*Id.* ¶ 22.)

The stated reason for the termination was conduct unbecoming of a county employee. (*Id.* ¶ 23.) However, that purported reason has no basis in fact and was instead a mere pretext for discrimination against Mr. Bostock based on his sex and or sexual orientation, if not direct evidence of the same. (*Id.*)

Mr. Bostock timely filed a charge of discrimination on the basis of sex and sexual orientation with the Equal Employment Opportunity Commission (“EEOC”). (*Id.* ¶ 6.) Mr. Bostock filed this lawsuit within 90 days of the receipt of his Notice of Right to Sue from the EEOC. (*Id.* ¶ 7.)

### **III. STANDARD OF REVIEW**

This Court reviews de novo an order granting a motion to dismiss. *See Pedro v. Equifax, Inc.*, 868 F.3d 1275, 1279 (11th Cir. 2017). In assessing the sufficiency of a claim, the Court accepts all well-pleaded allegations as true and draws all reasonable inferences in the plaintiff’s favor. *Montgomery Cnty. Comm’n v. Fed. Hous. Fin. Agency*, 776 F.3d 1247, 1254 (11th Cir. 2015).

### **IV. SUMMARY OF ARGUMENT**

The District Court erred in dismissing Mr. Bostock’s claim for sexual orientation discrimination under Title VII. The District Court relied upon this Court’s decision in *Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248 (11th Cir. 2017).

However, *Evans* was wrongly decided and conflicts with the precedents of both the United States Supreme Court and the Eleventh Circuit.<sup>3</sup>

The holding in *Evans* that discrimination based on sexual orientation is not actionable under Title VII conflicts with the Supreme Court's decision in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989). In *Price Waterhouse*, the Supreme Court held that discrimination on the basis of a gender stereotype is in fact sex-based discrimination. When an employer discriminates against a gay or lesbian employee, the employer necessarily discriminates against the employee because he or she does not conform to the employer's stereotypical view of how a person of that gender should behave with respect to whom he or she is attracted. Thus, the employer has discriminated against the employee because of his or her sex in violation of Title VII. *Evans* is therefore in conflict with *Price Waterhouse*.

In *Evans*, the majority of the panel held that it was bound by the prior precedent rule to follow *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979).

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<sup>3</sup> Mr. Bostock acknowledges that under the prior panel precedent rule, a panel of this Court is generally bound to follow a prior panel decision except where that holding has been overruled or undermined to the point of abrogation by a subsequent en banc or Supreme Court decision. *See, e.g., Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998). For this reason, Mr. Bostock has filed concurrently with this brief a Petition for Hearing En Banc. As this Court is also aware, a petition for certiorari has been filed in *Evans* and is currently pending before the United States Supreme Court. (Sup. Ct. Case No. 17-370).

*Blum*, however, has been abrogated because it directly conflicts with *Price Waterhouse*'s holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer's stereotypical view of how an employee of that gender should act. Moreover, the entire basis upon which *Blum* based its statement regarding sexual orientation, an earlier Fifth Circuit decision, has been abrogated.

*Evans* also conflicts with this Court's holding in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, this Court held that discrimination against transgender individuals because of their gender-nonconformity is sex discrimination, whether on the basis of sex or gender and stated that all persons are protected from discrimination on the basis of gender stereotype. The same is true for gay or lesbian employees. When an employer discriminates against an employee on the basis of sexual orientation, the employer necessarily discriminates on the basis of sex or gender because the employee does not match the employer's stereotypical view of how an employee of that gender should behave. Such discrimination is prohibited under *Glenn*. Since *Evans* would allow such discrimination to occur, *Evans* conflicts with *Glenn*.

Finally, Title VII already protects employees against discrimination on the basis of sexual orientation because it prohibits discrimination against an employee

because of the employee's sex. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation involves one's sex in relation to the sex of people to whom one is attracted. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation, and no need to amend the statute to cover this type of discrimination because it is already prohibited. This Court should overrule its decision in *Evans* and reverse the District Court's dismissal of Mr. Bostock's sexual orientation discrimination claim.

### **ARGUMENT AND CITATION OF AUTHORITIES**

#### **A. *EVANS* CONFLICTS WITH THE SUPREME COURT'S DECISION IN *PRICE WATERHOUSE v. HOPKINS***

In *Price Waterhouse v. Hopkins*, the United States Supreme Court held that discrimination on the basis of gender stereotype is sex-based discrimination that violates Title VII. *See* 490 U.S. 228, 251 (1989). Six members of the Supreme Court agreed that Title VII prohibits not simply discrimination because of one's biological sex, but also gender stereotyping -- that is, failing to act and appear according to stereotypical gender expectations. *Id.* at 250-51(plurality opinion); *id.* at 258-61, (White, J., concurring); *id.* at 272-73(O'Connor, J., concurring). The Supreme Court stated that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes

associated with their group . . .” *Id.* at 251. The Court also emphasized that “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes.” *Id.* (emphasis added).

As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, “*Price Waterhouse* . . . demand[s] the conclusion that discrimination because an employee is gay violates Title VII’s proscription on discrimination ‘because of . . . sex.’” *Evans*, 850 F.3d at 1264 (Rosenbaum, J., concurring in part and dissenting in part). When an employer discriminates against a gay or lesbian employee, “the employer discriminates against the employee because she does not conform to the employer’s prescriptive stereotype of what a person of that birth-assigned gender should be. And so the employer discriminates against the employee ‘because of . . . sex.’” *Id.* (footnotes and citations omitted). *See also Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 350 (7th Cir. 2017) (noting that “[i]t would require considerable calisthenics to remove the ‘sex’ from ‘sexual orientation’” and that “[t]he logic of the Supreme Court’s decisions, as well as the common-sense reality that it is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex, persuade us that the time has come to overrule our previous cases that have endeavored to find and observe that line”).

In *Evans*, the majority of the panel held that it was bound by the prior precedent rule to follow *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), and rejected the appellant’s argument that *Price Waterhouse* and *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), support a cause of action for sexual orientation discrimination under Title VII. *Evans*, 850 F.3d at 1256. The basis of this conclusion was the majority’s determination that “*Price Waterhouse* and *Oncale* are neither clearly on point nor contrary to *Blum*.” 850 F.3d at 1256. With respect to the majority of the *Evans* panel, this is error.

*Blum* “‘directly conflict[s] with’ *Price Waterhouse*’s holding that Title VII prohibits an employer from discriminating against its employee on the basis that she fails to conform to the employer’s view of what a woman should be.” *Evans*, 850 F.3d at 1270 (Rosenbaum, J., concurring in part and dissenting in part). As Judge Rosenbaum noted in her partial concurrence and dissent in *Evans*, “*Price Waterhouse* requires us to apply the rule that ‘[a]n individual cannot be punished because of his or her perceived gender-nonconformity.’” *Id.* Since continued application of *Blum* would allow a woman to be punished precisely because of her perceived gender non-conformity--in this case, sexual attraction to other women--*Price Waterhouse* undermines these cases to the point of abrogation.” *Id.* (internal citations omitted).

Moreover, the entire basis on which the *Blum* Court based its statement regarding sexual orientation discrimination has been abrogated. In *Blum*, the primary issue on appeal was whether the defendant articulated a legitimate nondiscriminatory reason for the plaintiff's discharge. The former Fifth Circuit held that it did. 596 F.2d at 937. But after reaching this conclusion, which effectively resolved the appeal, the Fifth Circuit went to "comment briefly" on other issues raised on appeal. It was in this section of the opinion in which the former Fifth Circuit offered the statement that "[d]ischarge for homosexuality is not prohibited by Title VII." 597 F.2d at 938. In support of the proposition that Title VII does not prohibit "discharge for homosexuality," the former Fifth Circuit did not provide any analysis and simply cited an earlier holding in *Smith v. Liberty Ins. Co.*, 569 F.2d 325 (5th Cir. 1978).

In *Smith*, "the claim [wa]s not that [the plaintiff] was discriminated against because he was a male, but because as a male, he was thought to have those attributes more generally characteristic of females and epitomized in the descriptive 'effeminate.'" 569 F.2d at 327. The court held that such discrimination was not sex discrimination within the meaning of Title VII, *id.*, and noted in a footnote that "[t]he EEOC itself has ruled that adverse action against homosexuals is not cognizable under Title VII," *id.* n.1. *Smith* is no longer good law on this

point since its holding “vis-à-vis discrimination on the basis of sex stereotyping has clearly been abrogated by subsequent Supreme Court cases.” *Winstead v. Lafayette Cnty. Bd. of Cnty. Comm’rs*, 197 F. Supp.3d 1334, 1342 n.4 (N.D. Fla. 2016); *see also Price Waterhouse*, 490 U.S. 228 (1989). The District Court in *Winstead* also correctly noted that “[o]f course the EEOC has changed course” also on this issue. *Id.* In sum, “[e]very pillar supporting the reasoning of the *Smith* court has been knocked down.” *Id.* Thus, “*Smith* is one of many examples of a parsimonious reading of Title VII failing to stand the test of time.” *Id.* Thus, the entire basis on which *Blum* based its language regarding sexual orientation discrimination has been abrogated, and the Court in *Evans* erred in relying upon it as binding precedent. This error led to a decision that is itself in conflict with *Price Waterhouse*. This Court must act en banc to rectify that error.

**B. EVANS CONFLICTS WITH THIS COURT’S DECISION IN GLENN V. BRUMBY**

*Evans* also conflicts with this Court’s holding in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011). In *Glenn*, this Court clearly held that “discrimination against a transgender individual because of her gender-nonconformity is sex discrimination, whether it’s described as being on the basis of sex or gender.” 663 F.3d at 1317. This Court noted that a number of pre-*Price Waterhouse* decisions had concluded that Title VII afforded no protection to transgender victims of sex

discrimination. This Court determined, however, that these cases had been “‘eviscerated’ by *Price Waterhouse*’s holding that ‘Title VII’s reference to ‘sex’ encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms.’” *Id.* at 1318 n.5 (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)).

In *Glenn*, this Court stated that “[a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype.” *Id.* at 1318 (11th Cir. 2011). The same is true for gay or lesbian employees. In *Hively*, the Seventh Circuit correctly observed that the appellant in that case, a lesbian employee,

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. Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.

853 F.3d at 346. Thus, *Glenn*, like *Price Waterhouse*, “demand[s] the conclusion that discrimination because an employee is gay violates Title VII’s proscription on discrimination ‘because of ... sex.’” *Evans*, 850 F.3d at 1264 (Rosenbaum, J. concurring in part and dissenting in part). *Evans* and *Glenn* “cannot be reconciled.” *Id.* at 1269.

To quote Judge Rosenbaum again:

And discrimination against an employee solely because she fails to conform to the employer's view that a woman should be sexually attracted to men only is no different than discrimination against a transsexual because she fails to conform to the employer's view that a birth-assigned male should have male anatomy. In both cases, the employer discriminates because the employee does not comport with the employer's vision of what a member of that particular gender should be. It's just as simple as that.

*Id.* at 1265-66. *Evans* was erroneously decided on the issue of sexual orientation discrimination because it directly conflicts with *Glenn*. This Court must therefore overrule *Evans* and reverse the District Court's dismissal of Mr. Bostock's claim for sexual orientation discrimination under Title VII.

### **C. TITLE VII ALREADY PROTECTS EMPLOYEES AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION**

Title VII makes it an unlawful employment practice for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex.” 42 U.S.C. § 2000e-2(a)(1).

The Supreme Court's precedents make plain that Title VII's prohibition against discrimination because of sex has become a robust source of protection without regard for hyper-technical distinctions.

In *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), a case addressing same-sex sexual harassment, the Supreme Court stated that “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII. *But statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils ...*” *Id.* at 80. The Supreme Court rejected in *Oncale* the premise that some mistreatment “because of . . . sex” might be outside Title VII’s reach, and thus repudiated the notion that the scope of the statute is limited. In *Oncale*, the Court adopted perhaps the simplest test for whether discrimination had occurred: whether the conduct at issue met Title VII’s “statutory requirements,” i.e., whether the harassment occurred because of the employee’s sex. *Id.* at 80.

The same test must apply to discrimination against gay and lesbian employees. Employers who take sexual orientation into account necessarily take sex into account, because sexual orientation involves a person’s sex in relation to the sex of people to whom that person is attracted. There is no principled reason to create an exception from Title VII for sex discrimination that involves sexual orientation, and no need to amend the statute to cover this type of discrimination. *See Hively*, 853 F.3d at 347 (explaining that “[a]ny discomfort, disapproval, or job decision based on the fact that the complainant -- woman or man -- dresses

differently, speaks differently, or dates or marries a same-sex partner, is a reaction purely and simply based on sex,” and “[t]hat means that it falls within Title VII's prohibition against sex discrimination, if it affects employment in one of the specified ways.”)

The EEOC has similarly concluded that “sexual orientation is inherently a “sex-based consideration,” and an allegation of discrimination based on sexual orientation is necessarily an allegation of sex discrimination under Title VII.” *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at \*5 (EEOC July 15, 2015) “Sexual orientation discrimination is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex.” *Id.* This is so because “[s]exual orientation’ as a concept cannot be defined or understood without reference to sex.” *Id.*

As the EEOC correctly explained:

When an employee raises a claim of sexual orientation discrimination as sex discrimination under Title VII, the question is not whether sexual orientation is explicitly listed in Title VII as a prohibited basis for employment actions. It is not. Rather, the question for purposes of Title VII coverage of a sexual orientation claim is the same as any other Title VII case involving allegations of sex discrimination -- whether the agency has “relied on sex-based considerations” or “take[n] gender into account” when taking the challenged employment action.

2015 WL 4397641, at \*4 (July 15, 2015). In other words, “sexual orientation is

inseparable from and inescapably linked to sex and, therefore ... allegations of sexual orientation discrimination involve sex-based considerations.” *Id.* at \*5. This interpretation is not only common sense, but it is also fully consistent with the Supreme Court’s holding in *Oncale*.

Nor does the fact that Title VII has not been specifically amended to expressly include sexual orientation mean that the statute does not already provide protection against such discrimination. The Supreme Court has warned against relying on Congressional inaction as an interpretative tool because “subsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.” *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted). Indeed, “[i]t is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.” *Id.*; accord *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969) (explaining that “[i]t is at best treacherous to find in congressional silence alone the adoption of a controlling rule of law.”) (quoting *Girouard v. United States*, 328 U.S. 61, 69 (1946)); *U.S. v. Price*, 361 U.S. 304, 310-311 (1960) (noting that “nonaction by Congress affords the most dubious foundation for drawing positive inferences.”). The reason is that “Congressional inaction lacks persuasive significance because several equally

tenable inferences may be drawn from such inaction, *including the inference that the existing legislation already incorporated the offered change.*” *Pension Ben Guar. Corp.*, 496 U.S. at 650 (internal quotations omitted) (emphasis supplied).<sup>4</sup>

Accordingly, *Evans* was wrongly decided because Title VII *already* prohibits discrimination on the basis of sexual orientation -- because it is discrimination on the basis of sex -- and there is no need to amend Title VII to make the prohibition more clear. Protection against sexual orientation discrimination is already provided by Title VII as *Price Waterhouse*, *Oncale*, and *Glenn* confirm. Accordingly, this Court should overrule *Evans* and reverse the District Court’s dismissal of Mr. Bostock’s claim for sexual orientation discrimination under Title VII.

## V. CONCLUSION

The holding of *Evans* on the issue of sexual orientation discrimination conflicts with the Supreme Court’s holding in *Price Waterhouse* and this Court’s holding in *Glenn*. Those cases, as well as Title VII’s prohibition against discrimination “because of ... sex” make clear that discrimination on the basis of an employee’s sexual orientation is illegal. The District Court relied on *Evans* in

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<sup>4</sup> And “Congressional inaction frequently betokens unawareness, preoccupation, or paralysis.” *Zuber*, 396 U.S. at 185 n.21; *see also Pension Ben. Guar. Corp.*, 496 U.S. at 650 (noting that “[e]ven less deference is due silence in the wake of unsuccessful attempts to eliminate an offending interpretation by amendment.”)

dismissing Mr. Bostock's claim for sexual orientation discrimination, but *Evans* was wrongly decided. Mr. Bostock respectfully requests that the Court overrule *Evans* and reverse the District Court's dismissal of his claim for sexual orientation discrimination in violation of Title VII.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

Counsel for Appellant hereby certifies that this brief complies with the type-volume limitation set forth in FRAP 32(a)(7)(B) because, excluding the parts of the document exempted by FRAP 32(f) and 11th Cir. R. 32-4, this document contains 4,332 words.

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**CERTIFICATE OF SERVICE**

This is to certify that I have this 13th day of November, 2017, served a copy of the **Initial Brief of Appellant Gerald Bostock** upon the parties listed below by depositing same in the United States mail, with sufficient postage thereon, addressed to:

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