

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

CASE NO. 17-13801-BB

GERALD BOSTOCK,

Appellant,

v.

CLAYTON COUNTY, GEORGIA

Appellee.

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

REPLY 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

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ARGUMENT AND CITATION OF AUTHORITIES

A. MR. BOSTOCK ACKNOWLEDGES THE PRIOR PANEL PRECEDENT RULE WHICH IS WHY HE HAS SOUGHT INITIAL EN BANC REVIEW OF THIS APPEAL

Clayton County devotes considerable space and attention in its brief to arguing the prior panel precedent rule and alleges that Mr. Bostock is somehow improperly attempting to relitigate *Evans v. Ga. Reg. Hosp.*, 850 F.3d 1248 (11th Cir. 2017) cert. denied, No. 17-370, 2017 WL 4012214 (U.S. Dec. 11, 2017).¹ But as both Mr. Bostock’s Initial Brief and Petition for Hearing En Banc make clear, he is attempting to do no such thing.

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*,

¹ Clayton County cites to this Court’s denial of rehearing en banc in *Evans* and the Supreme Court’s denial of certiorari, going so far as to argue that “the Eleventh Circuit evidently concluded that Evans does not conflict with Glenn because it denied the plaintiff’s petition for rehearing en banc in *Evans*” and that “the Supreme Court evidently concluded that Evans does not conflict with Price Waterhouse because it very recently denied the plaintiff’s petition for a writ of certiorari in *Evans*.” (Appellee’s Br. at 24, 25.) Clayton County’s position is completely unfounded. As this Court is well aware, “attaching precedential weight to a denial of rehearing en banc would be unmanageable” *Luckey v. Miller*, 929 F.2d 618, 622 (11th Cir. 1991), and it is well-settled that “denial of certiorari imparts no implication or inference concerning the [Supreme] Court’s view of the merits.” *Hughes Tool Co. v. Trans World Airlines, Inc.*, 409 U.S. 363, 365 (1973).

150 F.3d 1324, 1326 (11th Cir. 1998). For this reason, Mr. Bostock filed concurrently with his Initial Brief a Petition for Hearing En Banc. He has done so based on his counsel's reasoned belief in the exceptional importance of the issue raised and his counsel's reasoned belief that that the District Court's decision in this case and the panel decision in *Evans* are contrary to *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), so that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court.

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

In Mr. Bostock's Initial Brief, he established that *Evans* conflicts with *Price Waterhouse v. Hopkins*, in which 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).

Because discrimination against an employee on the basis of his sexual orientation is discrimination against him for failing to conform to a stereotypical view of how

an employee of his gender should behave, sexual orientation discrimination is therefore sex-based discrimination under *Price Waterhouse*. (See Appellant’s Init. Br., pp. 7, 9-13.)

Clayton County argues that *Price Waterhouse* and *Evans* are not in conflict because *Price Waterhouse* “does not clearly and directly address whether sexual orientation discrimination is prohibited by Title VII, but rather merely addresses gender stereotypes relating to how one appears or behaves in the workplace.” (Appellee’s Br. at 28.) But this is a distinction without a difference, and one that the decision in *Price Waterhouse* does not permit the Court to draw.

Price Waterhouse 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.” 490 U.S. at 251 (emphasis added). As the Seventh Circuit recently explained in *Hively v. Ivy Tech Cmty. Coll. of Indiana*, 853 F.3d 339, 346 (7th Cir. 2017), “a policy that discriminates on the basis of sexual orientation does not affect every woman, or every man, but it is based on assumptions about the proper behavior for someone of a given sex.”² This type of discrimination based on

² In *Hively*, 853 F.3d 339, the Seventh Circuit issued an en banc decision reversing the decision of the panel, 830 F.3d 698 (11th Cir. 2017), which determined, like this Court did in *Evans*, that sexual orientation discrimination claims were not cognizable under Title VII. The Seventh Circuit’s en banc decision was issued

assumptions about “proper” behavior for someone of a given sex is *exactly* what *Price Waterhouse* prohibits. As the Seventh Circuit further explained

Hively 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 . . . Hively’s claim is no different from the claims brought by women who were rejected for jobs in traditionally male workplaces, such as fire departments, construction, and policing. The employers in those cases were policing the boundaries of what jobs or behaviors they found acceptable for a woman (or in some cases, for a man).

Hively, 853 F.3d at 346. Thus, “[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.” *Id.* This Court’s Panel Opinion in *Evans*, if allowed to remain in force, would permit the discrimination forbidden by *Price Waterhouse*. Clayton County’s argument to the contrary simply begs the question.

For the same reasons, *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979), upon which the majority of the *Evans* panel relied, also conflicts with *Price Waterhouse*. Clayton County argues that *Price Waterhouse* “did not clearly and directly overrule or abrogate Blum’s holding that Title VII does not prohibit discrimination on the basis of sexual orientation.” (Appellee’s Br. at 31.) But *Blum*

approximately one month after this Court’s Panel Opinion in *Evans*, compare 850 F.3d 1248 with 853 F.3d 339, so that this Court did not have the benefit of the entire Seventh Circuit’s thorough consideration until now.

“‘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).³ This is because “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.” *Id.*

Moreover, *Evans* and *Blum* are fundamentally irreconcilable with the articulation in *Price Waterhouse* of the oft-cited principle that courts should afford similar judicial treatment to discrimination against each of the enumerated groups protected by Title VII.⁴ That principle also renders *Evans* flatly irreconcilable with this Court’s seminal decision in *Parr v. Woodmen of the World Life Ins. Co.*, 791

³ Additionally, *Price Waterhouse*’s sex stereotyping holding flatly nullified the only case the *Blum* Court cited in support of its Title VII holding. *See Blum*, 597 F.2d at 938 (citing *Smith v. Liberty Mut. Ins. Co.*, 569 F.2d 325, 327 (5th Cir. 1978); *see also Evans*, 850 F.3d at 1271 n.15 (Rosenbaum, J., dissenting) (discussing *Price Waterhouse* and *Smith*).

⁴ *Price Waterhouse*, 490 U.S. at 244, n.9 (courts should “treat[] each of the enumerated categories [in Title VII] exactly the same”); *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1 (1998) (citations omitted); *see also Oncale*, 523 U.S. at 78 (deciding a man can discriminate against a man, citing law that has “rejected any conclusive presumption that an employer will not discriminate against members of his own race.”); *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986) (recognizing the same hostile work environment cause of action under Title VII for sex-based harassment that had been recognized in lower courts for years for harassment based on race or national origin).

F.2d 888, 892 (11th Cir. 1986), which held that “[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race.” *See Hively*, 853 F.3d at 349 (analogizing to *Parr*, in holding that because the discrimination disappears if one were to “change the sex of one partner in a lesbian relationship, ... [t]his reveals that the discrimination rests on distinctions drawn according to sex”); *id.* at 359 (Flaum, J., concurring) (“Cases analyzing employment actions based on interracial relationships provide an apt illustration”); *Christiansen v. Omnicom, Inc.*, 852 F.3d 195, 204 (2d Cir. 2017) (Katzmann, C.J., concurring) (explaining that the unlawfulness of discrimination based on interracial relationships must extend to discrimination based on same-sex relationships under *Price Waterhouse* and *Obergefell*).

Blum’s holding regarding sexual orientation discrimination has thus been abrogated by *Price Waterhouse*, and this Court’s Panel Opinion 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 now act to rectify that error.

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

Evans also conflicts with *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), in which this Court 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. Clayton County argues that *Glenn* did not address sexual orientation discrimination and instead addressed "the separate and distinct issue of whether discrimination against a transgendered individual because of her gender non-conformity is actionable sex discrimination." (Appellee's Br. at 24.) Again, this is a distinction without a difference.

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). Thus, "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." *Evans*, 850 F.3d at 1265-66 (Rosenbaum, J., concurring in part and dissenting in part); *see also Hively*, 853 F.3d at 346 ("Our panel described the line between a gender nonconformity claim and one based on sexual orientation as gossamer-thin; we conclude that it does not exist at all.") Clayton County argues that the panel in *Evans* applied *Glenn*. (Appellee's Br. at 24-25.) But in doing so, the majority in *Evans* failed to recognize that *Glenn*'s holding, "that discrimination

solely because a birth-assigned male failed to conform to the employer’s prescriptive stereotype for what men should be by being transsexual constitutes gender-based discrimination in violation of Title VII ... cannot be reconciled” with the holding in *Evans*. See *Evans*, 850 F.3d at 1269 (Rosenbaum, J. concurring in part and dissenting in part). This Court must therefore overrule *Evans* and reverse the District Court’s dismissal of Mr. Bostock’s claim for sexual orientation discrimination in violation of Title VII.

D. TITLE VII ALREADY PROTECTS EMPLOYEES AGAINST DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Clayton County asserts that Mr. Bostock’s argument that Title VII already protects employees against discrimination on the basis of sexual orientation is somehow “comically circular.” (Appellee’s Br. at 25.) But there is nothing comically circular about the plain language of a statute. Title VII already makes it an unlawful employment practice to discriminate against any individual “because of such individual’s ... sex.” 42 U.S.C. § 2000e-2(a)(1). As set forth in Mr. Bostock’s Initial Brief, 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 the people to whom that person is attracted. 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.”); *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.”) As the Seventh Circuit noted in *Hively*, 853 F.3d at 342, this is especially true in light of the Supreme Court’s holding that the Due Process and Equal Protection Clauses of the Constitution protect the right of same-sex couples to marry, *Obergefell v. Hodges*, — U.S. —, 135 S.Ct. 2584 (2015). Any other result “creates a paradoxical legal landscape in which a person can be married on Saturday and then fired on Monday for just that act.” *Hively*, 853 F.3d at 342 (internal quotation and citation omitted).

Clayton County also misconstrues Mr. Bostock’s arguments regarding *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998). The point is not that *Oncale* specifically held that Title VII prohibits sexual orientation discrimination -- it did not. Rather, the point is that 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 so limited. As the Seventh Circuit observed concerning *Oncale*, “[t]he Court could

not have been clearer: the fact that the enacting Congress may not have anticipated a particular application of the law cannot stand in the way of the provisions of the law that are on the books.” *Hively*, 853 F.3d at 345.

Clayton County similarly misconstrues Mr. Bostock’s arguments regarding the fact that Title VII has not been specifically amended to expressly include sexual orientation. The point is that merely because the statute does not mention sexual orientation does not mean that it does not already provide protection against such discrimination. *See Oncale*, 523 U.S. at 80 (noting that “statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils ...”); *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990) (“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.*” (internal quotations omitted) (emphasis supplied).⁵

⁵ Clayton County argues that Congress is the appropriate branch to address these arguments. (Appellee’s Br. at 28.) But there is no need to “amend” Title VII or “redefine” the term “sex” under Title VII for sexual orientation claims to be cognizable. As the *Hively* Court explained, “[t]he question ... is not whether this court can, or should ‘amend’ Title VII to add a new protected category to the familiar list of [protected groups in Title VII],” but rather, “what it means to discriminate on the basis of sex, and in particular, whether actions taken on the basis of sexual orientation are a subset of actions taken on the basis of sex.” 853, F.3d at 343. The plain language of the statute is clear, and equally clear is the rule that “statutory prohibitions often go beyond the principal evil to cover reasonably

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. This Court should overrule the panel opinion in *Evans* and reverse the District Court's dismissal of Mr. Bostock's claim for sexual orientation discrimination under Title VII.

CONCLUSION

As the Supreme Court explained, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotypes associated with their group . . ." *Oncale*, 523 U.S. at 251. This Court's panel opinion in *Evans* conflicts with the Supreme Court's holding in *Price Waterhouse*, this Court's holding in *Glenn*, and the plain language of Title VII's prohibition against discrimination because of an employee's sex. When an employer discriminates against an employee based on the employee's sexual orientation, the employer is necessarily discriminating against him because he does not conform to the employer's discriminatory and stereotypical view about how people of the employee's sex "should" behave. As a result, the employer

comparable evils." *Id.* (citing *Oncale*, 523 U.S. at 79-80). Indeed, by contending that the plain language of Title VII does *not* protect Mr. Bostock, Clayton County is essentially arguing for a *judicially-created* exception to Title VII.

discriminates “because of ... sex” in violation of Title VII. Mr. Bostock respectfully urges this Court to overrule *Evans* and reverse the District Court’s dismissal of his claim for sexual orientation discrimination in violation of Title VII of the Civil Rights Act of 1964.

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 2,915 words.

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CERTIFICATE OF SERVICE

This is to certify that I have this 12th day of January, 2018, served a copy of the **Reply 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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