No. 15-3775

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MELISSA ZARDA and WILLIAM ALLEN MOORE, JR., co-independent executors of the estate of Donald Zarda,
Plaintiffs/Appellants,

v.

ALTITUDE EXPRESS, INC., doing business as SKYDIVE LONG ISLAND; and RAY MAYNARD,
Defendants/Appellees.

On Appeal from the United States District Court
for the Eastern District of New York

EN BANC BRIEF OF AMICUS CURIAE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN SUPPORT OF PLAINTIFFS/APPELLANTS AND IN FAVOR OF REVERSAL

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Senior Appellate Attorney

JEREMY D. HOROWITZ
Attorney

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Office of General Counsel
131 M St., N.E., Room 5SW24J
Washington, D.C. 20507
(202) 663-4716
jeremy.horowitz@eeoc.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC" or "Commission") is the primary agency charged by Congress with interpreting and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* This appeal addresses whether claims of sexual orientation discrimination are cognizable under Title VII as claims of sex discrimination. Because such claims necessarily involve impermissible consideration of a plaintiff's sex, gender-based associational discrimination, and sex stereotyping, the EEOC believes they fall squarely within Title VII's prohibition against discrimination on the basis of sex. In furtherance of its strong interest in the interpretation of the federal anti-discrimination employment laws, and in response to the invitation in this Court's Order of May 31, 2017, the EEOC offers its views to the Court. Fed. R. App. P. 29(a).

STATEMENT OF THE ISSUE

Does Title VII of the Civil Rights Act of 1964 prohibit discrimination on the basis of sexual orientation through its prohibition of discrimination "because of … sex"?

STATEMENT OF THE CASE

A. Statement of the Facts

Plaintiff Donald Zarda worked for Defendant Altitude Express as a skydiving instructor.[1] Following one jump, a customer complained that Zarda had disclosed his homosexuality and other personal details during the jump. Zarda was fired soon thereafter. He sued Altitude Express claiming sex discrimination under Title VII, gender and sexual orientation discrimination under New York state law, and violation of state and federal wage and hour laws.

B. District Court and Circuit Court Decisions

The district court granted summary judgment to Altitude Express on Zarda's Title VII claim, finding no evidence that his termination was connected to his failure to conform to a masculine stereotype. At the same time, the district court found sufficient evidence of sexual orientation discrimination to allow Zarda's state law discrimination claim to go forward. Zarda sought reconsideration of the denial of his Title VII claim based on the newly decided *Baldwin v. Foxx,* EEOC Appeal No. 0120133080, 2015 WL 4397641 (July 16, 2015), an EEOC administrative decision holding that sexual orientation discrimination violates Title VII. The district court denied the motion, concluding it was bound by *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000), which held that Title VII does not prohibit discrimination based on sexual

[1] Zarda is deceased. Two executors of his estate have replaced him as plaintiff.

orientation. At trial on his state law discrimination claim, the jury found that Zarda had not proved that his sexual orientation was a determining factor in his termination.

On appeal, Zarda challenged the dismissal of his Title VII claim under *Simonton* but did not challenge the court's ruling that he had failed to establish a connection between his termination and his failure to conform to gender stereotypes in appearance or behavior. Thus, he limited his appeal to the question whether *Simonton* precludes claims of sexual orientation discrimination under Title VII.[2] A panel of this Court affirmed the district court's ruling, holding that "Zarda may receive a new trial only if Title VII's prohibition on sex discrimination encompasses discrimination based on sexual orientation – a result foreclosed by *Simonton*." Slip op. at 8. This Court also held that the jury's finding on Zarda's state law sexual orientation claim did not moot the Title VII issue because a sexual orientation discrimination claim under New York state law is subject to a "but-for causation" standard of proof, which is higher than the "motivating factor" standard attaching to Title VII claims. *Id.* at 7. Thus, this Court concluded, "if Title VII protects against sexual-orientation discrimination, then Zarda would be entitled to a new trial." *Id.* In its May 25, 2017 Order, this Court granted en banc rehearing limited to the issue whether Title VII's prohibition of discrimination "because of … sex" encompasses discrimination on the basis of sexual orientation.

[2] Zarda also appealed several other rulings relating to the trial. He does not seek en banc review of these rulings.

ARGUMENT

Title VII prohibits employers from discriminating against an individual "because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a)(1). This Court concluded seventeen years ago that "Title VII does not prohibit harassment or discrimination because of sexual orientation." *Simonton*, 232 F.3d at 35; *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217-218 (2d Cir. 2005). In the years since this Court decided *Simonton* and *Dawson*, however, the EEOC and an increasing number of courts (including, most recently, the Seventh Circuit sitting en banc) have analyzed the issue and come to the opposite conclusion. In doing so, they have repeatedly focused on three arguments about sexual orientation discrimination, none of which was addressed in *Simonton* or *Dawson*: that such discrimination (1) involves impermissible sex-based considerations, (2) constitutes gender-based associational discrimination, and (3) relies on sex stereotyping. For each of these reasons, sexual orientation discrimination *is* sex discrimination, and sex discrimination violates Title VII. *See Christiansen v. Omnicom Group, Inc.*, 852 F.3d 195, 207 (2d Cir. 2017) (Katzmann, C.J., concurring) (summarizing these theories and noting that "[n]either *Simonton* nor *Dawson* had occasion to consider these worthy approaches").

Several additional reasons warrant overruling *Simonton* and its progeny. First, the primary authorities on which that case relied are no longer followed. Second, as many courts have concluded, the line this Court drew in *Simonton* and *Dawson* between sexual orientation discrimination and discrimination based on sex stereotypes is

unworkable and leads to absurd results. Thus, both precedent and practicality dictate overruling *Simonton*.

I. Sexual Orientation Discrimination is Discrimination "Because of … Sex" Under Title VII.

As Chief Judge Katzmann's *Christiansen* concurrence noted, this Court did not have the benefit of three key arguments when it first addressed whether Title VII's prohibition on sex-based discrimination includes a prohibition on sexual orientation discrimination. *Christiansen*, 852 F.3d at 202, 206-07 (Katzmann, C.J., concurring). Those three arguments – that sexual orientation discrimination treats otherwise similarly situated people differently solely because of their sex, constitutes associational discrimination, and necessarily involves impermissible sex stereotyping, all in violation of Title VII – lead inexorably to the conclusion that discrimination because of sexual orientation cannot rationally be distinguished from discrimination because of sex.

Sexual orientation discrimination is, by definition, discrimination "because of … sex," in violation of Title VII.

In passing Title VII, Congress made the "simple but momentous announcement" that sex, like other protected characteristics, is "not relevant" to employment decisions; thus, in making such decisions, employers "may not take gender into account." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 239, 242 (1989). If an employer treats an employee less favorably than it would treat a comparable employee who, aside from his or her sex, is identical in all respects (including, for example, the

sex of that employee's spouse), the employer discriminates against the employee "because of sex." *See L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (employing "the 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 (internal citation and quotation marks omitted)); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983) (applying *Manhart*'s "simple test of Title VII discrimination"); *Baldwin*, 2015 WL 4397641, at *5 (noting that an employer who fires a lesbian employee but not a male employee for displaying a photo of a female spouse at work would violate Title VII under *Manhart* by impermissibly taking the employee's sex into account).

Several courts have already applied *Manhart*'s "simple test" to hold that sexual orientation discrimination constitutes discrimination because of sex. The Seventh Circuit en banc court posed the counterfactual scenario of "a situation in which [the plaintiff] is a man, but everything else stays the same: in particular, the sex or gender of the partner." *Hively v. Ivy Tech Community Coll.*, 853 F.3d 339, 345 (7th Cir. 2017) (en banc). To the extent no discrimination would have occurred in this alternate scenario, the court concluded, "[t]his describes paradigmatic sex discrimination." *Id.* (holding that sexual orientation discrimination therefore violates Title VII). In *Hall v. BNSF Railway Co.*, similarly, the court held that a plaintiff, a man married to another man, successfully alleged sex discrimination under Title VII when he was denied a spousal health benefit available to similarly situated women married to men. No. C13-2160,

2014 WL 4719007, at *3 (W.D. Wash. Sept. 22, 2014). The court in *Heller v. Columbia Edgewater Country Club* explained that a woman claiming sexual harassment could prove her claim if she could show that her manager would have treated her differently if she were a man dating a woman instead of a woman dating a woman. *Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002). In *Videckis v. Pepperdine University*, the court explained, "If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment," and therefore concluded that they "have stated a straightforward claim of sex discrimination." *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1161 (C.D. Cal. 2015).[3]

Each of these cases recognizes the same principle: sexual orientation discrimination requires the employer to take the employee's sex into account (in conjunction with the sex of that employee's actual or desired partner). *See Hively*, 853 F.3d at 358 (Flaum, J., concurring) ("Fundamental to the definition of homosexuality is the sexual attraction to individuals of the 'same sex.' … One cannot consider a person's homosexuality without also accounting for their sex: doing so would render 'same' and 'own' meaningless."); *Boutillier*, 221 F. Supp. 3d at 267 (noting that sexual orientation discrimination necessarily requires a consideration of the sex of the individual, as well as that of the partner). In short, an employer cannot discriminate

[3] *Videckis* is a Title IX case, but the court stressed that the same analysis applies to claims under Title IX and Title VII. *Videckis*, 150 F. Supp. 3d at 1158.

against an employee based on that employee's sexual orientation without taking the employee's sex into account – precisely what Title VII forbids. *Price Waterhouse*, 490 U.S. at 242.

Under this analysis, it is irrelevant that an employer discriminating on the basis of sexual orientation does not discriminate against *all* men or women, but only against those who are gay or lesbian. Title VII has never required an employer to discriminate against all employees in a protected class before recognizing an individual employee's claim. *See Connecticut v. Teal*, 457 U.S. 440, 455 (1982) ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of … sex merely because [it] favorably treats other members of the employees' group."); *Hively*, 853 F.3d at 346 n.3 ("A failure to discriminate against all women does not mean that an employer has not discriminated against one woman on the basis of sex."); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118 (2d Cir. 2004) (holding that a valid claim of gender discrimination does not require discrimination against all members of a disfavored class).

In her *Hively* dissent, Judge Sykes disagreed with the en banc majority's application of *Manhart*. She argued instead that the valid comparison in the sexual orientation context requires comparing the treatment of gay men to that of lesbians, rather than comparing a heterosexual man to a lesbian, or a gay man to a heterosexual woman. *See, e.g.*, *Hively*, 853 F.3d at 366 (Sykes, J., dissenting) ("If an employer is willing to hire gay men but not lesbians, then the comparative method has exposed an

actual case of sex discrimination."). But such an argument distorts *Manhart*'s "simple test." *Manhart*, 435 U.S. at 711. Rather than simultaneously changing both the plaintiff's (a) sex and (b) sexual orientation to create a hypothetical comparator, as Judge Sykes proposed, *Manhart* instead requires that the court change only the protected characteristic being analyzed – the plaintiff's sex. *See Hively*, 853 F.3d at 345 ("The fundamental question is not whether a lesbian is being treated better or worse than gay men, bisexuals, or transsexuals, because such a comparison shifts too many pieces at once."). Adopting Judge Sykes's approach strays from the simple *Manhart* approach by changing two variables; this "would no longer be a 'but-for-the-sex-of-the-plaintiff' test." *Christiansen*, 852 F.3d at 203 (Katzmann, C.J., concurring); *cf. Loving v. Virginia*, 388 U.S. 1, 7-8 (1967) (rejecting the argument in the Equal Protection Clause context that anti-miscegenation laws did not discriminate between races because it restricted members of both races equally from engaging in interracial relationships). In *Price Waterhouse*, the Supreme Court did not examine whether the plaintiff was treated differently from a comparable male perceived as insufficiently masculine. Instead, the Court asked, simply, whether she was treated differently *because of her sex*. *Price Waterhouse*, 490 U.S. at 241; *see also Hively*, 853 F.3d at 359 (Flaum, J., concurring) ("So if discriminating against an employee because she is homosexual is equivalent to discriminating against her because she is (A) a woman who is (B) sexually attracted to women, then it is motivated, in part, by an enumerated trait: the employee's sex. That is all an employee must show to successfully allege a

Title VII claim."). Sex alone is the key factor guiding the inquiry; "the holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine." *Nichols*, 256 F.3d at 874.

Sexual orientation discrimination constitutes associational discrimination that violates Title VII.

Sexual orientation discrimination also violates Title VII's prohibition against sex discrimination because it treats individuals differently based on the sex of those with whom they associate. Just as discrimination against individuals based on the race of their partners and friends constitutes a violation of Title VII, discrimination based on the sex of those with whom an individual associates similarly violates the statute. Such associational discrimination necessarily, and illegally, takes into account the employee's sex, in violation of Title VII. *See Price Waterhouse*, 490 U.S. at 243.

This Court recognized that associational discrimination violates Title VII. In *Holcomb v. Iona College*, 521 F.3d 130 (2d Cir. 2008), decided eight years after *Simonton*, a white assistant college basketball coach alleged he had been terminated because he married a black woman. This Court held that he had established a prima face case of race discrimination, explaining that "an employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race." *Id.* at 132. The holding did not depend on a theory of third-party injury; to the contrary, this Court explained, "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.

A panoply of cases from other circuits, involving a range of interracial associational relationships, have likewise concluded that such claims for association-based discrimination are cognizable under Title VII. *See, e.g.*, *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 892 (11th Cir. 1986) (interracial marriage); *Deffenbaugh-Williams v. Wal-Mart Stores, Inc.*, 156 F.3d 581, 589 (5th Cir. 1998) (interracial dating), *vacated in part on other grounds in Williams v. Wal-Mart Stores, Inc.*, 182 F.3d 333 (5th Cir. 1999) (en banc); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (having a biracial child); *Stacks v. Sw. Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1327 n.6 (8th Cir. 1994) (interracial working relationship); *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 249 (5th Cir. 2009) (interracial teacher-student friendship); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (interracial friendships or associations among coworkers).

As the Seventh Circuit recently explained, "[t]he fact that *Loving*, *Parr*, and *Holcomb* deal with racial associations, as opposed to those based on color, national origin, religion, or sex, is of no moment. The text of the statute draws no distinction, for this purpose, among the different varieties of discrimination it addresses …." *Hively*, 853 F.3d at 349. This Court and others have made the same observation. *See Whidbee v. Garzarelli Food Specialties, Inc.*, 223 F.3d 62, 69 n.2 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims."

(internal citation omitted)); *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 929 (9th Cir. 1982) ("Under [Title VII] the standard for proving sex discrimination and race discrimination is the same."); *Horace v. City of Pontiac*, 624 F.2d 765, 768 (6th Cir. 1980) (holding that standards and orders of proof used in race discrimination cases "are generally applicable to cases of sex discrimination"). These cases are consistent with the Supreme Court's pronouncement that Title VII "on its face treats each of the enumerated categories" – race, color, religion, sex, and national origin – "exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9; *see id.* (noting that even though the case involved sex discrimination, its analysis "appl[ied] with equal force to discrimination based on race, religion, or national origin"). Other than the statutory exception for bona fide occupational qualifications, 42 U.S.C. § 2000e-2(e)(1), there is no basis in the legislative history or elsewhere for applying different criteria when analyzing claims of discrimination based on race and those based on sex.

Thus, the analysis of race-based associational discrimination described above should apply with equal force to claims of sex-based associational discrimination. As the Seventh Circuit held in *Hively* when it endorsed the application of an associational discrimination theory to a claim of sexual orientation discrimination under Title VII, "to the extent that the statute prohibits discrimination on the basis of the race of someone with whom the plaintiff associates, it also prohibits discrimination on the basis of the national origin, or the color, or the religion, or (as relevant here) the sex of the associate. No matter which category is involved, the essence of the claim is

that the *plaintiff* would not be suffering the adverse action had his or her sex, race, color, national origin, or religion been different." *Hively*, 853 F.3d at 349. If a plaintiff is in a relationship with someone of the same sex, and an adverse employment consequence results from that relationship, discrimination has occurred "because of [the plaintiff's] … sex," in violation of Title VII. 42 U.S.C. § 2000e-2(a); *see Christiansen*, 852 F.3d at 204 (Katzmann, C.J., concurring) ("[I]f it is race discrimination to discriminate against interracial couples, it is sex discrimination to discriminate against same-sex couples.").

Sexual orientation discrimination necessarily involves sex stereotyping, in violation of Title VII.

Sexual orientation discrimination necessarily involves sex stereotyping, as it results in the adverse treatment of individuals because they do not conform to the norm that men should be attracted only to women, and women only to men. Such discrimination is at heart based on gender stereotypes – indeed, it is "as clear a gender stereotype as any." *Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring); *see also Hively*, 853 F.3d at 346 (characterizing the plaintiff's lesbianism as representing "the ultimate case of failure to conform to the female stereotype" in modern America). It therefore violates Title VII's prohibition of discrimination against employees "because of … sex." *Price Waterhouse*, 490 U.S. at 240 (citing 42 U.S.C. § 2000e-2(a)(1)).

Price Waterhouse involved a woman perceived by her employer to be insufficiently feminine. Six justices agreed that comments the defendant's

representatives made about the plaintiff – that she was "macho" and "overcompensat[ing] for being a woman," and would have better chances of promotion to partnership at her firm if she would "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry" – indicated discrimination based on sex stereotypes that is illegal under Title VII. *Id.* at 235, 251. As the Court held, "[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Id.* at 251. This conclusion followed from the Court's earlier recognition that Congress passed Title VII "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." *Id.* (quoting *Manhart*, 435 U.S. at 707 n.13).

Many circuits have relied on *Price Waterhouse* in concluding that employers violate Title VII's prohibition against sex discrimination when they discriminate against employees for failing to conform to gender-based stereotypes by acting in an effeminate or masculine manner or by wearing gender-nonconforming clothing. *See, e.g.*, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 459-60 (5th Cir. 2013) (en banc) (holding that liability was warranted under Title VII if a jury concluded harassment occurred because the victim "fell outside of [the harasser's] manly-man stereotype"); *Smith v. City of Salem*, 378 F.3d 566, 574 (6th Cir. 2004) ("After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or makeup, is engaging in sex discrimination because the discrimination would

not occur but for the victim's sex. It follows that employers who discriminate against men because they do wear dresses and makeup, or otherwise act femininely, are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex."); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) ("[T]he holding in *Price Waterhouse* applies with equal force to a man who is discriminated against for acting too feminine. … At its essence, the systematic abuse directed at [the plaintiff] reflected a belief that [he] did not act as a man should act."); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011) (summarizing cases and concluding that "instances of discrimination against plaintiffs because they fail to act according to socially prescribed gender roles constitute discrimination under Title VII according to the rationale of *Price Waterhouse*").

Intentional discrimination on the basis of the gender of an individual's actual or desired partners – whether that individual is lesbian, gay, bisexual, or straight – necessarily implicates stereotypes relating to "proper" sex-specific roles in romantic and/or sexual relationships. The Seventh Circuit sitting en banc recently made this connection explicit, referring to lesbianism as "the ultimate case of failure to conform to the female stereotype" and concluding:

> [A] policy that discriminates on the basis of sexual orientation … is based on assumptions about the proper behavior for someone of a given sex. … Any 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. That means that it falls within Title VII's

> prohibition against sex discrimination, if it affects employment in one of the specified ways.

Hively, 853 F.3d at 346-47 (emphasis added). An increasing number of district courts have applied *Price Waterhouse* and come to the same conclusion. *See, e.g.*, *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) ("[S]tereotypes concerning sexual orientation are probably the most prominent of all sex related stereotypes, which can lead to discrimination based on what the Second Circuit refers to interchangeably as gender non-conformity. … [H]omosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus."); *EEOC v. Scott Med. Health Ctr., P.C.*, 217 F. Supp. 3d 834, 842 (W.D. Pa. 2016) ("[D]iscrimination on the basis of sexual orientation is a subset of sexual stereotyping and thus covered by Title VII's prohibitions on discrimination 'because of sex' …."); *Videckis*, 150 F. Supp. 3d at 1160 ("Stereotypes about lesbianism, and sexuality in general, stem from a person's views about the proper roles of men and women – and the relationships between them. Discrimination based on a perceived failure to conform to a stereotype constitutes actionable discrimination …."); *Terveer v. Billington*, 34 F. Supp. 3d 100, 116 (D.D.C. 2014) (finding that a homosexual plaintiff's allegations that he was denied promotions and subjected to a hostile work environment because his sexual orientation "did not conform to the Defendant's gender stereotypes associated with men" stated a sufficient claim to survive a motion to dismiss).

This connection between sexual orientation and gender nonconformity applies even if the employee exhibits no other gender-nonconforming behavior. *See Christiansen*, 852 F.3d at 206 (Katzmann, C.J., concurring) ("[I]f gay, lesbian, or bisexual plaintiffs can show that they were discriminated against for failing to comply with some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men, they have made out a cognizable sex discrimination claim."); *Centola v. Potter*, 183 F. Supp. 2d 403, 410 (D. Mass. 2002) ("Conceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what 'real' men do or don't do."); *Heller*, 195 F. Supp. 2d at 1222-24 ("[A] jury could find that Cagle repeatedly harassed (and ultimately discharged) Heller because Heller did not conform to Cagle's stereotype of how a woman ought to behave. Heller is attracted to and dates other women, whereas Cagle believes that a woman should be attracted to and date only men. … That Cagle perceived Heller as being a lesbian does not compel a different outcome."); *Terveer*, 34 F. Supp. 3d at 116 (holding that a complaint alleging the plaintiff's "sexual orientation is not consistent with the Defendant's perception of acceptable gender roles" stated a valid claim of sex discrimination).

II. Precedent and Practicality Also Justify Overruling *Simonton* En Banc.

In addition to the three arguments above, several additional factors counsel in favor of overruling *Simonton* and its progeny. First, the cases on which *Simonton* relied are largely no longer good law. Second, experience has shown that the distinction *Simonton* draws between valid gender nonconformity claims and invalid sexual orientation claims is unworkable in practice and leads to absurd results.

The cases on which *Simonton* relied are no longer good law.

In concluding that Title VII does not prohibit sexual orientation discrimination, *Simonton* relied on a number of cases that were subsequently overruled, either implicitly or explicitly. *Dawson*, in turn, relied on *Simonton* for this point. The irreparable erosion of those decisions' foundation further justifies overturning them en banc.

Simonton cited three out-of-circuit cases in support of its conclusion that judicial decisions consistently "refus[e] to interpret 'sex' to include sexual orientation." *Simonton*, 232 F.3d at 35-36 (citing *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996)). In light of subsequent Supreme Court decisions, however, none of these cases justifies retaining *Simonton* as binding precedent. *See Price Waterhouse*, 490 U.S. at 250-51; *Oncale v. Sundowner Offshore Oil Servs., Inc.*, 523 U.S. 75, 79 (1998) (noting that Title VII's protections extend beyond those the statute was initially enacted to combat, and cover

"reasonably comparable evils" as well). *DeSantis*, which held that Title VII does not protect against discrimination based on sex stereotypes, 608 F.2d at 331-32, was abrogated by *Price Waterhouse* and is no longer good law. *See Nichols*, 256 F.3d at 875 (recognizing abrogation). *Williamson*, a four-paragraph decision from the Eighth Circuit that predates *Price Waterhouse* and *Oncale*,[4] relies entirely on *DeSantis* without additional analysis. *Williamson*, 876 F.2d at 70. In a subsequent case reversing dismissal of a suit alleging harassment based on sex and "perceived sexual preference," the Eighth Circuit discounted *Williamson*'s precedential authority, referring to it as a "pre-*Oncale* case." *Schmedding v. Tnemec Co.*, 187 F.3d 862, 864 n.3 (8th Cir. 1999). *Wrightson* relies exclusively on *Williamson* and *DeSantis*, and was dicta on this point in any event. *Wrightson*, 99 F.3d at 143. Thus, of the three cases *Simonton* cites to support its conclusion, two are no longer followed and the third relies wholly on the other two. These cases do not justify maintaining *Simonton* in the face of more recent legal developments.

***Simonton* and *Dawson*'s distinction between permissible sexual orientation discrimination and impermissible gender stereotyping is unworkable and leads to absurd results.**

Simonton should be overruled for another, equally important reason: the distinction it draws between impermissible sex-based stereotyping and permissible

[4] Although *Williamson* came down a month after *Price Waterhouse* was announced, all briefing was concluded before the Supreme Court issued its *Price Waterhouse* decision, the opinion does not mention *Price Waterhouse*, and there is no indication the panel considered the case's potential impact on its decision.

sexual orientation discrimination is unworkable and leads to absurd results. Under current Second Circuit law, employers cannot discriminate against employees based on an "animus toward their exhibition of behavior considered to be stereotypically inappropriate for their gender," but *can* discriminate "because of sexual orientation." *Dawson*, 398 F.3d at 217-18. Given that "homosexuality is the ultimate gender non-conformity, the prototypical sex stereotyping animus," *Boutillier*, 221 F. Supp. 3d at 269, courts asked to differentiate between sex stereotyping and sexual orientation have understandably found the task difficult, if not essentially impossible. *See 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."); *Videckis*, 150 F. Supp. 3d at 1159 ("Simply put, the line between sex discrimination and sexual orientation discrimination is 'difficult to draw' because that line does not exist, save as a lingering and faulty judicial construct."). Indeed, even this Court recognized the inherent difficulty in this sort of line-drawing, observing that "[s]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." *Dawson*, 398 F.3d at 218.

The distinction drawn in *Simonton* between valid claims based on gender nonconformity and invalid ones based on sexual orientation discrimination is inherently arbitrary, leading to irrational outcomes. In *Simonton* this Court cautioned against allowing plaintiffs to rely on a *Price Waterhouse* gender-nonconformity theory to

"bootstrap protection for sexual orientation into Title VII," reasoning that the two are not interchangeable "because not all homosexual men are stereotypically feminine, and not all heterosexual men are stereotypically masculine." *Simonton*, 232 F.3d at 38; *see also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1259-60 (11th Cir. 2017) (Pryor, J., concurring) (distinguishing between homosexual status and homosexual conduct). But this leads to the absurd result that *only* those gay men who act "stereotypically feminine" and those lesbians who act stereotypically masculine are entitled to protection from discrimination. *See Christiansen*, 852 F.3d at 200; *cf. Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285, 287 (3d Cir. 2009) (focusing on plaintiff's high voice, failure to curse, grooming, clothes, neatness, manner of crossing his legs, effeminacy, conversational interests, and degree of "pizzazz" when operating a work machine in determining whether the claimed discrimination was based on gender stereotypes rather than sexual orientation). In short, "[p]laintiffs who 'look gay' succeed under Title VII while those merely known or thought to be gay do not." Brian Soucek, *Perceived Homosexuals: Looking Gay Enough for Title VII*, 63 Am. U. L. Rev. 715, 766 (2014). Whether an individual is entitled to protection under federal law cannot turn on such an arbitrary factor.

It is similarly absurd to hold that Title VII protects persons like the heterosexual employee in *Boh Brothers*, 731 F.3d at 459-60, from egregious same-sex harassment but does not protect a homosexual man from similarly egregious harassment, as in *Simonton*. 232 F.3d at 35 (noting that the plaintiff was subjected to

vulgar, graphic comments and conduct). There is no justification for such a judicially created "carve-out" exception that offers protections to most individuals but denies them to gays and lesbians. Even more absurd, as the law now stands in this Circuit, employees are free to marry their same-sex partners, as the Supreme Court held in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), but can lawfully be fired the next day for doing so. Overruling *Simonton* and holding that Title VII protects against sexual orientation discrimination would eliminate these inconsistent and arbitrary results.

III. The Contrary Arguments Do Not Justify Retaining *Simonton* as Binding Authority.

Opponents to the EEOC's position have raised two additional arguments – based in part on *Simonton* itself – against finding that Title VII's ban on sex discrimination extends to sexual orientation discrimination. Neither provides a sufficient justification to retain *Simonton* as the law of this Circuit.

First, some have argued that Title VII would not have been reasonably understood to protect against sexual orientation discrimination when Congress enacted it in 1964. *See, e.g.*, *Hively*, 853 F.3d at 360-63 (Sykes, J., dissenting). But as the Supreme Court clearly held when discussing Title VII, "[S]tatutory prohibitions often go beyond the principal evil [the law was passed to address] to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." *Oncale*, 523 U.S. at 79; *see also Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 381 (1977) (Marshall, J.,

concurring in part and dissenting in part) (explaining that "[t]he evils against which [Title VII] is to be aimed are defined broadly"). Indeed, the Court has taken this approach repeatedly when interpreting Title VII. It has recognized, for example, that the statute's prohibition against discrimination in the terms and conditions of employment encompasses sexual harassment of an employee, *see Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986), and that the term "because of … sex" can include same-sex harassment, *see Oncale*, 523 U.S. at 79-80, though Congress likely considered neither issue when it initially passed the law. As explained above, in cases of sexual orientation discrimination, "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." *Oncale*, 523 U.S. at 80 (internal quotation marks omitted). This situation "meets the statutory requirements" of Title VII and warrants its protections, regardless of Congress's interpretation in 1964. *Id.* As the Seventh Circuit explained in *Hively*, an en banc court "sits … to consider what the correct rule of law is now in light of the Supreme Court's authoritative interpretations, not what someone thought it meant one, ten, or twenty years ago." *Hively*, 853 F.3d at 350.

Second, the panel in *Simonton* emphasized the fact that Congress has not enacted bills that would have explicitly extended Title VII to prohibit sexual orientation discrimination. *Simonton*, 232 F.3d at 35; *Evans*, 852 F.3d at 1261 (Pryor, J., concurring). But the Supreme Court has made clear that the outcome of legislative efforts to amend Title VII over the years says nothing about what the existing statute

prohibits. As the Court explained, "[S]ubsequent legislative history is . . . a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law," because "several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990). With respect to failed proposals to offer explicit workplace protections on the basis of sexual orientation, it is possible legislators objected to the proposed addition of other protections as well, or disagreed with the language of proposed exemptions, or did not think the proposed protections extended far enough. *See, e.g.*, Jill D. Weinberg, *Gender Non-Conformity: An Analysis of Perceived Sexual Orientation & Gender Identity Protection Under the Employment Non-Discrimination Act*, 44 U.S.F. L. Rev. 1, 8 (2009) (noting that the proposed Equality Act of 1974 would have added protections on the basis of both sexual orientation and marital status); Kate B. Rhodes, *Defending ENDA: The Ramifications of Omitting the BFOQ Defense in the Employment Non-Discrimination Act*, 19 Law & Sexuality 1, 4, 8-11 (2010) (noting opposition to one version of the Employment Non-Discrimination Act based on its failure to protect transgender individuals, as well as debate over the scope of exemptions). In short, "we have no idea what inference to draw from congressional inaction or later enactments, because there is no way of knowing what explains each individual member's votes, much less what explains the failure of the body as a whole to change this 1964 statute." *Hively*, 853 F.3d at 344.

CONCLUSION

For the foregoing reasons, *Simonton* should be overruled, the judgment of the district court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

JAMES L. LEE
Deputy General Counsel

JENNIFER S. GOLDSTEIN
Associate General Counsel

ANNE NOEL OCCHIALINO
Senior Appellate Attorney

/s/ Jeremy D. Horowitz
JEREMY D. HOROWITZ
Attorney
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., Room 5SW24J
Washington, D.C. 20507
(202) 663-4716
jeremy.horowitz@eeoc.gov

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume requirements set forth in Federal Rules of Appellate Procedure Rules 29(a)(5) and Second Circuit Local Rules 29.1(c) and 32.1(a)(4)(A). This brief contains 6,096 words, from the Statement of Interest through the Conclusion, as determined by the Microsoft Word 2016 word processing program, with 14-point proportionally spaced type for text and footnotes.

/s/ Jeremy D. Horowitz
JEREMY D. HOROWITZ
Attorney
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., Room 5SW24J
Washington, D.C. 20507
(202) 663-4716
jeremy.horowitz@eeoc.gov

Dated: June 23, 2017

CERTIFICATE OF SERVICE

I, Jeremy D. Horowitz, hereby certify that I electronically filed the foregoing brief with the Court via the appellate CM/ECF system and filed 15 copies of the foregoing brief with the Court by next business day delivery, postage pre-paid, this 23rd day of June, 2017. I also certify that all counsel of record, who have consented to electronic service, will be served the foregoing brief via the appellate CM/ECF system.

/s/ Jeremy D. Horowitz
JEREMY D. HOROWITZ
Attorney
U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
Office of General Counsel
131 M St. N.E., Room 5SW24J
Washington, D.C. 20507
(202) 663-4716
jeremy.horowitz@eeoc.gov