Case No 15-15234

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

JAMEKA K. EVANS
Plaintiff-Appellant,

v.

GEORGIA REGIONAL HOSPITAL, *et al.*
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Georgia

Appellant's Initial Brief

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CORPORATE DISCLOSURE STATEMENT

Pursuant to 11th Cir. R. 26.1-2(c), Appellant Jameka Evans hereby submits the following Certificate of Interested Persons and Corporate Disclosure Statement, and pursuant to Fed. R. App. 26.1 and Eleventh Circuit Rule 26.1-1, hereby certifies that the following is a complete list of the Trial Judge, Magistrate, all attorneys, persons, associations of persons, firms, partnerships or corporations that have an interest in the outcome of the case, including subsidiaries, conglomerates, affiliates and parent corporations, and other identifiable legal entities related to a party:

Clark, Lisa - Appellee

Evans, Jameka K. - Appellant

Georgia Regional Hospital at Savannah - Appellee

(Hon.) Hall, J. Randal - United States District Judge

Lambda Legal Defense and Education Fund, Inc. - Counsel for Appellant

Moss, Charles - Appellee

Nevins, Gregory R. - Counsel for Appellant

Powers, Jamekia - Appellee

(Hon.) Smith, G.R. - United States Magistrate Judge

There are no publicly traded corporations that have in interest in the outcome of this case.

STATEMENT REGARDING ORAL ARGUMENT

Appellant Jameka Evans ("Evans") believes that oral argument is appropriate because this appeal presents issues of broad importance regarding the scope of the federal ban on sex discrimination in employment (including an issue of first impression in this Circuit), which the court below characterized as involving "conflicting legal currents" Docket Entry ("DE") 12. Also, it is known that the Court will have the arguments against Title VII's applicability set forth by the District Court and the arguments in favor of Title VII's applicability set out in this brief. At this juncture, it is unknown whether Defendants/Appellees will file a brief and whether Evans will file a reply brief; therefore, it seems all the more important that the Court entertain oral argument so that any questions it has may be addressed, whether or not covered by this brief or the District Court's decision. Moreover, Evans submits that none of the factors in FRAP 34(a)(2) indicate that oral argument in this appeal is unnecessary.

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

The jurisdiction of the District Court was founded on Title VII of the Civil Rights Act of 1964 (42 U.S.C. §§ 2000e et seq.), and 28 U.S.C. §§ 1331 and 1343. The jurisdiction of the United States Court of Appeals for the Eleventh Circuit is provided by 28 U.S.C. §§ 1291 and 2106-07, in that this is an appeal seeking to reverse the final judgment against Evans entered by the United States District Court for the Southern District of Georgia. October 29, 2015 is the date of entry of both the final judgment issued by United States District Court Judge J. Randal Hall that is sought to be reviewed, DE 13, as well as Judge Hall's order adopting DE 4 of the Magistrate. DE 12. The appeal is from an order and final judgment that adjudicated all of the claims with respect to all parties, and no parties or issues remain in the District Court. Evans did not file a motion for new trial or alteration of the judgment. Evans timely filed her Notice of Appeal on November 19, 2015.

STATEMENT OF THE ISSUE PRESENTED

The primary question presented is whether Evans stated a claim of sex discrimination under Title VII by alleging that she endured workplace discrimination because of her gender-nonconforming appearance and demeanor and her sexual orientation.

STATEMENT OF THE CASE

On January 23, 2015, the EEOC sent Jameka Evans a notice of her right to sue in federal court based on the charge she had filed alleging sex discrimination under Title VII. On April 23, 2015, Evans filed a complaint *pro se* in United States District Court for the Southern District of Georgia against her former employer, Georgia Regional Hospital, and three individuals (collectively, "Defendants"). In her complaint, Evans alleged that she was targeted by her workplace supervisor "for termination due to the fact that [she] do[es] not carry [her]self in a traditional woman manner" and because she is a self-described "gay female" and " . . . it is evident [she] identif[ies] with the male gender because [she] presented [her]self visually (male uniform, low male haircut, shoes, etc.)." DE 1 at 3. Evans further alleged that she was "punished because [her] status as a gay female did not conform to [her] department head's … gender stereotypes associated with women." *Id.* at 4.

Evans sought to file *in forma pauperis* and to have counsel appointed. DE 2. Accordingly, Magistrate G.R. Smith, conducted a review pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii) prior to service of the complaint on any of the Defendants. He issued a Report and Recommendation, DE 4, on September 10, 2015, recommending that Evans' complaint be dismissed without opportunity to amend. DE 4. While the Magistrate acknowledged that Evans had alleged both

discrimination on the basis of "gender non-conformity (appearing 'male')" and on the basis of "her homosexuality (gay female)," *id.* at 4, DE 4 focused primarily on prior cases outside the Eleventh Circuit that had declined to permit sexual orientation discrimination claims to be brought under Title VII. *Id.* at 4-6. In considering Evans' gender non-conformity claim, DE 4 failed to cite this Circuit's decision in *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011), and instead concluded:

> . . . to say that an employer has discriminated on the basis of gender non-conformity is just another way to claim discrimination based on sexual orientation. To inflict an adverse employment action (unfair discipline, denied promotion, etc.) because a male is too effeminate or a female too masculine is to discriminate based on sexual orientation ('gender nonconformity'), which is reflected in the gender image one presents to others -- that of a male, even if one is biologically a female. Hence, Evans' allegations about discrimination in response to maintaining a male visage also do not place her within Title VII's protection zone, even if labeled a 'gender conformity' claim, because it rests on her sexual orientation no matter how it is otherwise characterized.

DE 4 at 6-7. The same day that he issued DE 4, Magistrate Smith ordered DE 4 to "be served upon plaintiff and counsel for defendants." DE 5.

After securing an extension to file objections, DE 8, Evans objected to DE 4 on October 23, 2015. DE 9. Amicus curiae Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") submitted a brief in support of Evans' objections, along with a motion to file its amicus brief. DE 10-11. On October 29, 2015, the District Court entered final judgment against Evans. DE 13. In his order, Judge

Hall, wrote that "[a]fter a careful, de novo review of the entire record," he "concurs with the Report and Recommendation (DE 4). DE 12. Judge Hall also granted leave to file the amicus brief, which the court said "illuminates the conflicting legal currents in this realm." *Id.* In that order, Judge Hall added, "To that end, the Court APPOINTS pro hac vice counsel Gregory R. Nevins [of Lambda Legal] to represent plaintiff on appeal." *Id.*

This Court reviews de novo a *sua sponte* dismissal for failure to state a claim under 28 U.S.C. § 1915(e)(2)(B)(ii). *Dimanche v. Brown*, 783 F.3d 1204, 1214 (11th Cir. 2015).

SUMMARY OF THE ARGUMENT

The District Court's dismissal of Evans' complaint must be reversed because that court's conclusion that Evans cannot bring a Title VII claim based on discrimination against her due to her gender-nonconforming appearance and demeanor directly conflicts with binding decisions of the Supreme Court, this Court, and every other court of which Evans is aware.

The District Court's dismissal also should be reversed because that court's further conclusion that a Title VII sex discrimination claim cannot be premised on allegations of sexual orientation discrimination likewise cannot be reconciled with Supreme Court authority, other decisions of this Court, or decisions of other

federal courts and the EEOC.[1] Numerous Supreme Court cases hold - with limited exceptions not relevant here[2] – that Title VII is violated when an employee suffers mistreatment that would not have occurred had the employee been of the other sex. It is now settled law that Title VII prohibits discrimination based on gender-nonconformity and there is no justification for immunizing such discrimination if the gender non-conforming trait is an employee's attraction to those of the same sex rather than a different sex. Even more fundamentally, when a woman is fired for her romantic interest in women while men are not, it is plain that discrimination "because of such individual's . . . sex" has occurred. 42 U.S.C. § 2000e-2(a)(1). This is underscored by this Court's landmark decision that discrimination against an employee in an interracial marriage is by definition discrimination based on the *employee's* race. Because Title VII treats all covered traits the same, discrimination against a woman in a relationship with a woman must be

[1] As DE 4 itself acknowledged, the question of Title VII's coverage of sexual orientation discrimination has not been addressed by this Court. DE 4 at 4; *see also Isaacs v. Felder Servs.*, LLC, No. 2:13cv693, 2015 U.S. Dist. LEXIS 146663, at *8 (M.D. Ala. Oct. 29, 2015) ("In the Eleventh Circuit, the question is an open one.").

[2] Evans recognizes that there is a very limited "bona fide occupational qualification" ("BFOQ") defense to adverse employment action claims and that a hostile work environment is actionable only when the offending conduct is sufficiently severe or pervasive. Neither of those limitations on sex discrimination claims is relevant to the present case, however, as the District Court did not question whether Evans endured an adverse employment action or hostile work environment, only whether it was on a basis actionable under Title VII.

discrimination because of her sex if she would not have been treated adversely if her relationship had been with a man.

Contrary authority, when examined closely, should not prove remotely persuasive to this Court. In particular, LGBT employees cannot be excluded from the protections of Title VII by relying on the presumed intent of the drafters of Title VII, or any subsequent Congress that decided not to amend it, given the Supreme Court's specific command that courts entertain all claims that meet the statutory requirements of Title VII.

ARGUMENT

I. EVANS UNQUESTIONABLY HAS STATED A TITLE VII CLAIM BASED ON A GENDER STEREOTYPING THEORY.

The District Court clearly erred in dismissing Evans' claim that she was discriminated against because she did not conform to gender stereotypes, given the Supreme Court's seminal decision condemning discrimination based on gender nonconformity, *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S. Ct. 1775 (1989), and this Court's leading case applying that decision, *Glenn*, 663 F.3d 1312.

A. This Court Held In *Glenn* That All Employees, Including LGBT Employees, Are Protected From Discrimination Based On Their Nonconformity With Gender Norms.

Price Waterhouse ruled that, "As for the legal relevance of sex stereotyping, we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group . . . ." 490

U.S. at 251. There, the partnership of Price Waterhouse rejected Ann Hopkins; one of her evaluators called her "macho," another advised her to take "a course at charm school," while another advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry." *Id.* at 235. The Court found obvious the sex discrimination, based on stereotypes of how women should present themselves. *Id.* at 256 ("It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.'"). Lest any mystery remain, this Court held that, after *Price Waterhouse*, "discrimination on the basis of gender stereotype is sex-based discrimination." *Glenn*, 663 F.3d at 1316.[3] The holding below – that, somehow, protections against discrimination based on gender-nonconformity are not available to lesbian, gay, bisexual or transgender ("LGBT") people – was flatly rejected by this Court. *Id.* at 1318-19 ("All persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. . . . Because these protections are afforded to everyone, they cannot be denied to a transgender individual.").

B. There Is No Contrary Authority That Would Categorically Exclude An LGBT Employee From Claiming Gender Stereotyping Discrimination, As The District Court Did Here.

[3] While the Glenn litigation was brought under 42 U.S.C. § 1983, this Court was clear that the sex discrimination analysis was the same as under Title VII, except that Title VII is even less accepting of employer excuses for differential treatment by gender. *Glenn*, 663 F.3d at 1321.

There is no legal support for the District Court's rejection of Evans' claim of discrimination based on her masculine appearance and demeanor.[4] To the contrary, a mountain of authority supports the principle that an employee, including a lesbian, can bring a claim of sex discrimination if she has been discriminated against because of what is perceived as a masculine appearance, demeanor, or behavior in the workplace. While many of these cases are wrong in holding that it is *only* in these circumstances that a gay man or lesbian can bring a Title VII claim, the law is clear that, if the lesbian or gay male plaintiff is asserting discrimination based on gender-nonconforming behavior, appearance or demeanor at work, she or he has a claim under Title VII. *Pagan v. Gonzalez*, 430 F. App'x 170, 172 (3d Cir. 2011) (lesbian had no Title VII claim for discrimination in "the absence of any evidence to show that the discrimination was based on Pagan's acting in a masculine manner"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221

[4] DE 4 curiously cites *Thomas v. Osegueda*, No. 2:15-CV-0042, 2015 U.S. Dist. LEXIS 77627, at *4 (N.D. Ala. June 16, 2015), as support for dismissal of Evans' gender-nonconformity claim. In that case, however, the court cited with *approval* a HUD regulation barring "discrimination . . . [against] a lesbian woman dressing in masculine clothes." *Id.* at *10-11 (citation omitted). This is virtually the same as Evans' allegations that she "was targeted by Mr. Moss for termination due to the fact that I do not carry myself in a traditional woman manner" and that " . . . it is evident I identify with the male gender because I presented myself visually (male uniform, low male haircut, shoes, etc.)." DE 1 at 3. The *Thomas* court did reject a sex discrimination claim brought by a gender-*conforming, heterosexual* man, 2015 U.S. Dist. LEXIS 77627, at *12, but that situation is virtually the opposite of the facts alleged here.

(2d Cir. 2005) ("Generally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance"); *id.* at 223 (a lesbian has a Title VII claim if "her alleged failure to conform her appearance to feminine stereotypes resulted in her suffering any adverse employment action."); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 264 (3d Cir. 2001) (gay male plaintiff's claim failed absent allegation that "he failed to comply with societal stereotypes of how men ought to appear or behave . . . ."); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000) (gay male plaintiff's claim failed absent evidence that "co-workers perceived him to be too feminine to fit the male image at Ford"). This body of case law reflects courts' recognition that an employer "cannot persuasively argue that *because* [an employee] is homosexual, he is precluded from bringing a gender stereotyping claim." *Prowel v. Wise Bus. Forms, Inc*., 579 F.3d 285, 292 (3d Cir. 2009) (emphasis in original). "There is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate *homosexual* man may not." *Id.* (emphasis in original).

C. Evans' Claim Of Gender Stereotyping Discrimination Is Supported – Not Undermined – By Her Assertion of Bias Against Her Because She Is A Lesbian.

Evans also claims that the discrimination against her was based on the fact that she is a lesbian. This supports her sex discrimination claim instead of militating against it.

In *Videckis v. Pepperdine Univ.*, No. CV-15-00298, 2015 U.S. Dist. LEXIS 167672 (C.D. Cal. Dec. 15, 2015), a recent Title IX case that relied significantly on Title VII law and endorsed the reasoning of the EEOC's decision in *Baldwin v. Foxx*,[5] the court explained the challenges some courts have had in considering sex stereotyping and sexual orientation discrimination claims, such as those discussed in the section of this brief immediately above: "courts have acknowledged the difficulty of distinguishing sexual orientation discrimination from discrimination based on sex or gender stereotypes." *Videckis*, 2015 U.S. Dist. LEXIS 167672, at *16. The court explained that the problem lay in insisting on distinguishing between the two without a legal reason to do so: "[T]he 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." *Id.* at *16-17. In doing so, the court echoed the sentiments of this Court in *Glenn* that, rather than trying to draw some line between discrimination against transsexuals and discrimination against those who transgress gender norms in other ways,

[5] Throughout this brief, Evans invokes the EEOC's recent decision holding that sexual orientation discrimination is necessarily sex discrimination under Title VII. *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 EEOPUB LEXIS 1905 (July 16, 2015).

courts should recognize that the same discrimination is transpiring: "There is thus a congruence between discriminating against transgender and transsexual individuals and discrimination on the basis of gender-based behavioral norms." *Glenn*, 663 F.3d at 1316; *see also id.* at 1317 ("sex discrimination includes discrimination against transgender persons because of their failure to comply with stereotypical gender norms.").

Thus, anti-coverage decisions are simply wrong in trying to draw a line between discrimination based on certain sex stereotypes (such as how an individual dresses or acts at work) and discrimination based on other sex stereotypes (such as to whom an individual is attracted). Moreover, this false line flouts Supreme Court precedent and the well-understood, broad definition of sex stereotypes that developed in the first quarter-century of Title VII's existence.

1. The Supreme Court's Manhart Decision Unequivocally Holds That Title VII Proscribes the "Entire Spectrum of Disparate Treatment of Men and Women Resulting From Sex Stereotypes."

The attempt by courts to limit the universe of relevant gender norms to only those that Ann Hopkins was deemed to transgress in *Price Waterhouse* fails for many reasons, the most obvious being that the declaration in *Price Waterhouse* that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" is a quote from *City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 98 S. Ct. 1370 (1978), which had a

decidedly broad view of what constituted discrimination based on sex stereotypes. *See Price Waterhouse*, 490 U.S. at 251, quoting *Manhart*, 435 U.S. at 707, n.13. *Manhart* struck down the employer's policy of making women, as a group, pay higher pension contributions because it is "unquestionably true" that "[w]omen, as a class, do live longer than men. 435 U.S. at 707. But because "[m]any women do not live as long as the average man" and Title VII's "focus on the individual is unambiguous," a "'stereotyped' answer to" the question of whether discrimination occurred "may not be the same as the answer that the language and purpose of the statute command." *Id.*at 708.

It is also notable that Justice Stevens did not invent the "entire spectrum" quote in *Manhart*, but instead quoted *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971). *Sprogis* is a case Justice Stevens sat on while on the Seventh Circuit, which held that the airlines' policy of forbidding female flight attendants from marrying violated Title VII. *Id.* Thus, the important holding that Title VII was "intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes" had its genesis in a case that was about stereotypes about whether women who were married lost their desirability as employees. *Id.* While *Sprogis* was about women marrying men, any restriction that seizes on stereotypes of whether and when women should marry and what type of family lives they should be allowed to have plainly runs afoul of Title VII. In

short, any notion that Title VII's concern with discrimination based on gender stereotypes is limited to one's "behavior, appearance, or demeanor" is inconsistent with longstanding binding precedent regarding Title VII's reach.

2. Bias Against Women Based On Stereotypes About The Relationships And Family Structures They Do Or Should Create Is Sex Discrimination, As Demonstrated By Countless Cases.

A careful analysis of the sex stereotype bias cases beginning around 1969 – under either Title VII or the Equal Protection Clause – reveals that the fight against sex discrimination always has been concerned with rules and exclusions that would dictate to women (whether working or not) whether they could be in a relationship and, if so, which kind; what their roles in their relationships should be; and what type of family structures they could establish consistent with their job obligations. In 1969, this Court's predecessor held that an employer could not discriminate against women for the position of "switchmen" because that job was "occasionally subject to late hour call-outs." *Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969). "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks." *Id.* While such a schedule could take women away from their husbands and children, "[m]en have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise

of Title VII is that women are now to be on equal footing." *Id.*; *see generally Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1047 (5th Cir. 1973) (Equal Pay Act violated when "women are not solicited as sales trainees because 'females were never considered as suitable for traveling.'").

Five years after *Weeks*, the Fifth Circuit held that the demands of its holding were not met by "testimony adduced from the co-workers that substantial lifting of weights is involved in the warehouseman position and that such work was "too much for a woman such as plaintiff and physically demanding of a man." *Long v. Sapp*, 502 F.2d 34, 40 (5th Cir. 1974). The Fifth Circuit also held, in *Pond v. Braniff Airways, Inc.*, 500 F.2d 161 (5th Cir. 1974) that, "if the employer in any way permits stereotypical culturally-based concepts of the abilities of people to perform certain tasks because of their sex to creep into its thinking, then Title VII will come to the employee's aid." *Id.* at 166. In *Hardin v. Stynchcomb*, 691 F.2d 1364 (11th Cir. 1982), this Court set forth an excellent sampling of cases rejecting the notion that employer decisions could be based on sex stereotypes:

> The narrow scope of the bfoq exception does not encompass perceptions of male and female roles based upon romantic paternalism or the divine plan for the separation of the sexes. *See, e.g.*, [] *Manhart*, 435 U.S. [at 707 . . .] (employment decisions cannot be predicated on myth or stereotyped assumptions of male or female characteristics); *Dothard v. Rawlinson*, 433 U.S. [321,] 334-35, 97 S. Ct. [2720,] 2729 [(1977)](Title VII prohibits refusal to hire an individual on basis of stereotyped characterizations of the sexes; purpose of Title VII is to allow individual women freedom to choose

> dangerous work); *Weeks* [], 408 F.2d [at] 236 [] (Title VII rejects romantic paternalism and vests individual women with power to decide whether to take on unromantic tasks); *Rosenfeld v. Southern Pacific Co*., 444 F.2d 1219, 1225 (9th Cir. 1971) (congressional purpose is elimination of subjective assumptions and traditional stereotyped conceptions about physical ability of women to do particular work); *Woody v. City of West Miami*, 477 F. Supp. 1073, 1079 (S.D. Fla. 1979) (Title VII prohibits stereotypical culturally-based concepts of ability to perform certain tasks because of sex); . . . *Manley v. Mobile* [*Cty.*], 441 F. Supp. 1351, 1358 (S.D. Ala. 1977) (chivalry should become neither paternalism nor instrument of employment discrimination against women).

Hardin, 691 F.2d at 1370 n.20.

This Court's decision in *Glenn* is the final nail in the coffin of the canard that Title VII is only concerned with discrimination based on the gender stereotypes of workplace behavior, appearance, and demeanor. *Glenn* cited a litany of Supreme Court cases decrying discrimination based on many different sex stereotypes. For example, *Frontiero v. Richardson*, 411 U.S. 677, 93 S. Ct. 1764 (1973) (plurality opinion), struck down a law conditioning certain benefits for female service members on their showing that their spouses depended on them, the *Frontiero* Court noting that such laws are often animated by "stereotyped distinctions between the sexes." *See Glenn*, 663 F.3d at 1319, quoting *Frontiero*, 411 U.S. at 685. Later, *Stanton v. Stanton*, 421 U.S. 7, 95 S. Ct. 1373 (1975), held that Utah's lower age of majority for women "could not be sustained by the stereotypical assumption that women tend to marry earlier than men" or justified

by "'old notions'" about men and women's behavior. *Glenn*, 663 F.3d at 1319, quoting *Stanton*, 421 U.S. at 14. Similarly, in *Weinberger v Wiesenfeld*, 420 U.S. 636, 95 S. Ct. 1225 (1975), the Court concluded that "'the Constitution also forbids gender-based differentiation' premised on the stereotypical assumption that a husband's income is always more important to the wife than is the wife's to the husband." *Glenn*, 663 F.3d at 1319, quoting *Weinberger*, 420 U.S. at 645.

Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107, 119-20 (2d Cir. 2004), is further evidence of the concern in sex discrimination jurisprudence about gender stereotypes other than workplace behavior, appearance, and demeanor. The *Back* court found gender stereotyping discrimination in the employer's view "that a woman cannot 'be a good mother' and have a job that requires long hours, or in the statement that a mother who received tenure 'would not show the same level of commitment [she] had shown because [she] had little ones at home.'" *Id.* at 120 (alteration in original). Rather than view the exact stereotypes at issue in *Price Waterhouse* as an exclusive list, the *Back* court said, regarding the "question [of w]hat constitutes a gender stereotype? *Price Waterhouse* suggested that this question must be answered in the particular context in which it arises, and without undue formalization." *Id.* at 119-20.

There is another reason why it is wrong for courts to try to limit actionable stereotyping to that involving behavior, appearance, or demeanor at work. A

decade ago, the Sixth Circuit observed that "all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices." *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006). But the court inexplicably went on to hold that a claim based on sex stereotyping is viable only if based on "characteristics that were readily demonstrable in the workplace . . . ." *Id.* at 763. Given that race discrimination and religious discrimination are treated the same under Title VII (see III B, *infra*), such a rule would mean that the man who never speaks about his Muslim faith or of his different-race wife could be legally fired, and that it is only the man who proudly speaks at work about his involvement with his mosque or who features on his desk the wedding picture of him and his different-race wife who would be protected. Obviously, nothing in the language of Title VII tolerates, let alone compels, such anomalous differences in legal protections.

And indeed, many courts from around the country already have rejected the narrow "behavior, appearance, demeanor" at work framework and recognized that sexual orientation discrimination falls within *Price Waterhouse*'s proscription on sex stereotyping discrimination. *Isaacs*, 2015 U.S. Dist. LEXIS 146663, at *10 ("To the extent that sexual orientation discrimination occurs . . . based on her or his perceived deviations from 'heterosexually defined gender norms,' this, too, is sex discrimination, of the gender-stereotyping variety."); *see also Boutillier v.*

Hartford Pub. Sch., No. 3:13cv1303, 2014 U.S. Dist. LEXIS 134919, *3-4 (D. Conn. Sept. 25, 2014) (holding that "discriminatory conduct commenced after certain individuals became aware of her sexual orientation . . . set forth a plausible claim she was discriminated against based on her non-conforming gender behavior."). The District of Colorado likewise held that a male plaintiff stated a claim under Title VII for sex discrimination "based on [his] failure to conform to male stereotypes" in light of his allegations that "he did not take part in male braggodicio about sexual exploits," that "he did not joke about gays as other male pilots did," that he "submitted paperwork to SkyWest designating his male domestic partner for" certain benefits, and that he "traveled on SkyWest flights with his domestic partner." *Deneffe v. SkyWest, Inc*., No. 14-cv-00348, 2015 U.S. Dist. LEXIS 62019, *15-16 (D. Colo. May 11, 2015) (citations omitted).

The court in *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014), further recognized that the potential types of permissible *Price Waterhouse* "sex-stereotyping" allegations include that the plaintiff is "a homosexual male whose sexual orientation is not consistent with the Defendant's perception of acceptable gender roles," and that his "status as a homosexual male did not conform to the Defendant's gender stereotypes associated with men under [the alleged discriminating official's] supervision or at the [defendant's workplace]." *Id.* at 116 (record citations omitted). Such allegations are sufficient to "allege[] that

Defendant denied him promotions and created a hostile work environment because of Plaintiff's nonconformity with male sex stereotypes." *Id.*, *citing Price Waterhouse*, 490 U.S. at 251; *see also Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012) (denying defendant's summary judgment motion where plaintiff alleged his supervisor discriminated against him based on sex stereotypes because "Koren chose to take his spouse's surname—a 'traditionally' feminine practice")*; Heller v. Columbia Edgewater Country Club*, 195 F. Supp. 2d 1212, 1224 (D. Or. 2002) (the facts could show that "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."); *Centola v. Potter*, 183 F. Supp. 2d 403, 409 (D. Mass. 2002) (Title VII's ban on sex stereotyping discrimination applies when "an employer acts upon stereotypes about sexual roles in making employment decisions.").

In sum, Title VII condemns all discrimination based on failure to conform to sex stereotypes, whether that nonconformity is appearance, demeanor, or behavior at work; deciding to marry or not marry; or a lesbian sexual orientation.

II. THE TITLE VII SEX DISCRIMINATION INQUIRY TURNS ON ONE QUESTION: WHETHER EVANS' ATTRACTION TO WOMEN WOULD HAVE BEEN A CONCERN IF EVANS HAD BEEN A MAN.

Conceptually, there is an even simpler formulation of why sexual orientation discrimination is sex discrimination under Title VII. This formulation does not

rely on sex stereotypes, but merely asks whether the employee would have been discriminated against if the employee had been of a different sex. If the answer is "no," then the discrimination plainly was "because of such individual's . . . sex."

A. The Coverage Inquiry Must Begin With Reference To The Test Of What Constitutes Discrimination "Because Of Such Individual's . . . Sex".

One of the great analytical contributions made by the EEOC's *Baldwin* decision is its pointing out how many of the older decisions holding that Title VII does not cover sexual orientation discrimination (hereinafter "anti-coverage decisions") focused on the absence of the words "sexual orientation" in Title VII. In the process, those anti-coverage decisions failed to treat "a sexual orientation claim [] the same as any other Title VII case involving allegations of sex discrimination" by simply asking whether the employer "has 'relied on sex-based considerations' or 'take[n] gender into account' when taking the challenged employment action." *Baldwin*, 2015 EEOPUB LEXIS 1905, at *12, citing *Price Waterhouse*, 490 U.S. at 239, 241-42. Anti-coverage decisions almost never articulate, let alone apply, the standard for determining that discrimination "because of such individual's . . . sex" has occurred. No responsible lawyer or judge would undertake to ask whether it is "fair use" under intellectual property law to appropriate someone else's work and pay her 90% of the proceeds – without undertaking a legal analysis of what "fair use" means. And yet, courts routinely

skip this analytical step when it comes to what constitutes sex discrimination under Title VII, even though the standard is not necessarily self-apparent. Indeed, the challenge of interpreting Title VII properly is reflected by the fact that multiple federal judges came up with the answer of "not sex discrimination" in each of these scenarios, when the Supreme Court's eventual answer was that it is:

- Can women allege sex discrimination against an employer when 75-80% of the employees in a given position are women, but women with young children are excluded? *Compare Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969) (unanimously holding that no sex discrimination occurred) *with Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544, 91 S. Ct. 496, 498 (1971) (unanimously reversing; "The Court of Appeals therefore erred in reading this section as permitting one hiring policy for women and another for men");

- Can women allege sex discrimination against an employer who charges them more for pension contributions based on "unquestionably true" actuarial differences in the lifespans of men and women? *Compare Manhart*, 435 U.S. at 707, 708 ("Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.") *with id.* at 725-28 (Burger, C.J. concurring in part and dissenting in relevant part);

- Can women allege sex discrimination against an employer that has a fetal protection policy disqualifying women of childbearing age from certain positions, where the company cannot avoid liability for any offspring's defects, because a mother cannot waive the rights of a fetus? *Compare Int'l Union v. Johnson Controls, Inc.*, 886 F. 2d 871 (7th Cir. 1989) (en banc) (policy should be evaluated under business necessity defense and passes muster under that test) *with Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 200, 111 S. Ct. 1196, 1204 (1991) ("Johnson Controls' policy "does not pass 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.'") quoting *Manhart*, 435 U.S. at 711;

- Can a man allege sex discrimination in an all-male work force because his being male was a factor in his being sexually harassed, although he could not allege that he would have been treated better as a woman, because he never would have hired for that position in the first place? *Compare Garcia v. Elf Atochem North America*, 28 F.3d 446, 451-452 (5th Cir. 1994) (no such claim is ever viable) *with Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 78-80, 118 S. Ct. 998, 1002 (1998) (claim is viable if there was discrimination because of sex, irrespective of whether Congress intended that result).

In short, anti-coverage decisions repeatedly have failed to appreciate the Supreme Court's simple – but controlling – jurisprudence that any significant differential in treatment of employees based on sex violates Title VII – because those decisions do not even attempt to articulate the relevant standard.

B. Sexual Orientation Discrimination Plainly Meets All Three Of The U.S. Supreme Court's Tests For What Constitutes Sex Discrimination Under Title VII.

The Supreme Court has articulated its test for what constitutes sex discrimination under Title VII in slightly different ways, although they are all substantively the same – and employer mistreatment of a woman who dates women (while accepting men dating women) fails the Court's tests, however articulated. *Phillips v. Martin Marietta Corp.* forbids an employer from having "one hiring policy for women and another for men." 400 U.S. at 544. Telling women they cannot date women while allowing men to do so obviously fails this test. *Manhart* derided "treatment of a person in a manner which but for that person's sex would be different." 435 U.S. at 711. Obviously, if the acceptability

of dating women depends on the sex of the employee, the *Manhart* "simple test" is violated. And *Price Waterhouse* ruled that "sex-based considerations" cannot be a factor in employment decisions. 490 U.S. at 242. If Robinson's marriage to the mayor's daughter is celebrated if it is Steve Robinson but the source of mistreatment for Sharon Robinson, "sex-based considerations" are improperly part of the employment decision.

C. *Oncale* Clarifies That Title VII Proscribes *All* Treatment Of A Person In A Manner Which But For That Person's Sex Would Be Different.

Even after *Phillips* and *Manhart*, some courts still believed it was wrong to engage in a "wooden application" or literal application of Title VII's words that did not serve the goals that Congress had in passing Title VII. E.g., *Goluszek v. Smith*, 697 F. Supp. 1452, 1456 (N.D. Ill. 1988). Those courts held that, even if a man sexually harassed by another man was literally discriminated against "because of . . . sex," he did not have a claim under Title VII, because such a claim was beyond the contemplation and goals of the 88th Congress. *Id.*

Goluszek was the philosophical standard-bearer of the cases holding that a man sexually harassed by a man could not claim sex discrimination under Title VII. *See Fredette v. BVP Mgmt. Assocs.*, 112 F.3d 1503, 1509 (11th Cir. 1997) ("Many cases rejecting same-sex harassment claims rely upon *Goluszek*"). The *Goluszek* court refused to engage in a "wooden application of" the statutory words;

"The court [] chooses instead to adopt a reading of Title VII consistent with the underlying concerns of Congress" in passing the law and reject such a claim because Congress sought to eradicate gender power imbalances in the workplace and no such circumstance was presented in that case. *Goluszek*, 697 F. Supp. at 1456. This court was not impressed; "We readily conclude that the *Goluszek* rationale is flawed." *Fredette*, 112 F.3d at 1509. And *Oncale* could hardly have been more emphatic in rejecting *Goluszek*'s approach in its unanimous ruling to the contrary. *Oncale*, 523 U.S. at 77-79. The Court held it was irrelevant that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when the words of the statute, which courts must follow irrespective of any divergence between that result and the assumed mindset of the members of the 88th Congress. *Id.* at 79 ("But statutory prohibitions often go beyond the principal evil 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."). Most importantly, *Oncale* held that courts are to entertain all sex discrimination claims that "meet[] the statutory requirements" of Title VII. *Id.* at 80.[6]

[6] Notably, this Court's Title VII jurisprudence has had an unwavering focus "on the statute's causation requirement -- i.e., that the discrimination occurs 'because of such individual's ... sex.'" *Fredette*, 112 F.3d at 1505; *Henson v. City of Dundee*, 682 F.2d 897, 904 (11th Cir. 1982) (noting that the inquiry is whether "but for her sex, she would not have been subjected to" the discrimination). That

Oncale relied on *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 103 S. Ct. 2622 (1983), which established that Title VII is violated when spouses are treated differently, benefit-wise, based on the gender of the employee. "Thus, if a private employer were to provide complete health insurance coverage for the dependents of its female employees, and no coverage at all for the dependents of its male employees, it would violate Title VII." *Id.* at 682. "Such a practice would not pass the simple test of Title VII discrimination that we enunciated in . . . *Manhart*, . . . for it would treat a male employee with dependents 'in a manner which but for that person's sex would be different.'" *Id.* at 682-83, *quoting Manhart*, 435 U.S. at 711.[7]

And indeed, many courts more recently have ruled in favor of lesbian or gay Title VII plaintiffs, using the simple logic that their romantic attraction or relationship would not be a problem if they were of the other sex. *Isaacs*, 2015

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focus led this Court to rule early on that a Title VII sex discrimination claim exists where there is a hostile work environment without pecuniary loss by the employee, and that same-sex sexual harassment can be actionable under Title VII. *Henson*, 682 F.2d at 905; *Fredette*, 112 F.3d at 1505. In each instance, the Supreme Court subsequently agreed with this Court's ruling. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 106 S. Ct. 2399 (1986); *Oncale*, 523 U.S. 75. *Meritor*, decided four years after *Henson*, specifically cited this court's decision with approval, 477 U.S. at 66-67, and the *Fredette* approach was adopted *sub silentio* by the Court a year after *Fredette* in *Oncale*. 523 U.S. at 78-80.

[7] The Court went on to clarify that Title VII still would be violated even if "magnitude of the discrimination were smaller," such as a sex-based differential in the level of spousal "hospitalization coverage" rather than a complete denial of medical coverage. *Newport News*, 462 U.S. at 683.

U.S. Dist. LEXIS 146663, at *9-10 ("If a business fires Ricky because of his sexual activities with Fred, while this action would not have been taken against Lucy if she did exactly the same things with Fred, then Ricky is being discriminated against because of his sex.") (citation, original alterations, and internal ellipses omitted); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 U.S. Dist. LEXIS 132878, at *9 (W.D. Wash. Sept. 22, 2014) ("Plaintiff alleges disparate treatment based on his sex, not his sexual orientation, specifically that he (as a male who married a male) was treated differently in comparison to his female coworkers who also married males."); *Koren*, 894 F. Supp. 2d at 1038 (citing evidence "that Miceli 'harbored ill-will' because [Koren] changed his name but that she would not have done so if a female employee had changed her name"); *Heller*, 195 F. Supp. 2d at 1223 ("A jury could find that Cagle would not have acted as she (allegedly) did if Plaintiff were a man dating a woman, instead of a woman dating a woman. If that is so, then Plaintiff was discriminated against because of her gender.") (footnote omitted); *see also Videckis*, 2015 U.S. Dist. LEXIS 167672, at *14, *22, *23 (Title IX case relying on Title VII law; "If Plaintiffs had been males dating females, instead of females dating females, they would not have been subjected to the alleged different treatment. Plaintiffs have stated a straightforward claim of sex discrimination under Title IX.").[8]

[8] Further support is found in *Foray v. Bell Atl.*, 56 F. Supp. 2d 327 (S.D.N.Y.

Many anti-coverage decisions say that the plaintiff was discriminated not because of his/her sex, but because of his/her sexual orientation. E.g., *Hamner v. St. Vincent Hosp. & Health Care Ctr., Inc.*, 224 F.3d 701, 707 (7th Cir. 2000); *Bibby*, 260 F.3d at 264 (*Bibby* "was discriminated against because of his sexual orientation. . . .[not] because he was a man"); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Spearman*, 231 F.3d at 1085 (the discrimination was "because of his apparent homosexuality, and not because of his sex."); *see also Metzger v. Compass Group U.S.A., Inc*., No. 98-cv-2386, 1999 U.S. Dist. LEXIS 14224 (D. Kan. Aug. 31, 1999) ("plaintiff offers no evidence to indicate such harassment was the result of a general hostility toward women, as opposed to a general hostility toward homosexuals."). But, saying "she was discriminated against not because of her sex, but because of something else" only makes sense under Title VII if that something else is not an inherently sex-based consideration (such as "because of her motherhood") and instead is a criterion that involves no sex-based consideration and that is applied equally by the employer to all employees (such as

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1999), where a man challenged his employer's domestic partner benefits program because it was available only to same sex couples. He argued that, if his "gender were female, he would be entitled to claim his [female] domestic partner as a eligible dependent. . . . " *Id.* at 329. The court responded that "Plaintiff's chief argument, that 'but for' his sex, he would not have been discriminated against, is supported by legal theorists and" the decision in *Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993). *See Foray*, 56 F. Supp. 2d at 329 (citations omitted). However, the court rejected the discrimination claim holding the plaintiff to be unlike a woman with a domestic partner, who under then-current law, could not marry and access marital benefits. *Id.* at 330.

"because of her tardiness"). In the same way that the law, per *Phillips* and its progeny, condemns an employer who says, "we don't discriminate against women, just women with young children," so it also should condemn the employer who says, "we don't discriminate against women, only women who are romantically interested in women." (assuming men who are romantically interested in women suffer no consequences).

III. IMMUNIZING DISCRIMINATION AGAINST THOSE WHO FORM SAME-SEX RELATIONSHIPS ALSO CANNOT BE SQUARED WITH THE CONSENSUS THAT DISCRIMINATION BECAUSE OF INTERRACIAL RELATIONSHIPS VIOLATES TITLE VII.

It additionally is impossible to reconcile the unanimous view of the courts and the EEOC for decades that discrimination based on an employee's interracial marriage or relationships is "manifestly" or "irrefutab[ly]" race discrimination proscribed by Title VII, with an argument that discrimination based on one's same-sex intimate relationships is not sex discrimination. *See Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986). The same principles of construction apply to determining what constitutes discrimination "because of race" and "because of . . . sex," and thus should dictate the same treatment of relationships involving the enumerated traits in Title VII.

A. Every Court To Consider The Question Has Followed This Court's Landmark *Parr* Decision Condemning Bias Based On An Employee's Interracial Relationship As Discrimination "Because Of Such Individual's Race" Under Title VII.

When the *Isaacs* court declared its agreement with the *Baldwin* decision, it found "[p]articularly compelling is its reliance on Eleventh Circuit precedent," 2015 U.S. Dist. LEXIS 146663, at *9, specifically *Parr*, 791 F.2d at 892.

This Court in *Parr* held that "Where 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." *Id.* (emphasis in original). Before *Parr*, courts had divided on the subject, with one of the leading cases, *Whitney v. Greater N.Y. Corp. of Seventh Day Adventists*, 401 F. Supp. 1363, 1366 (S.D.N.Y. 1975), holding that an employer must be taking into account the race of the employee when it discriminates based on an interracial marriage. *Parr* deemed *Whitney*'s logic "irrefutable, holding that "[m]anifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend." *Parr*, 791 F.2d at 891, quoting *Whitney*, 401 F. Supp. at 1366.

After *Parr*, the courts to consider the question of discrimination because of one's interracial relationships have unanimously agreed with this Court. *Floyd v. Amite Cty. Sch. Dist.*, 581 F.3d 244, 250 (5th Cir. 2009); *Holcomb v. Iona College*, 521 F.3d 130, 138-39 (2d Cir. 2008); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999); *Collin v. Rectors*

& Visitors of the Univ. of Va., No. 96-1078, 1998 U.S. App. LEXIS 21267, at *4 (4th Cir. Aug. 31, 1998) (while holding against the employee on a factual basis, specifically rejecting the lower court's categorical immunization of discrimination based on interracial marriages, because the plaintiff is alleging "by definition, that he has been discriminated against because of his race.") (quoting *Parr*); *Deffenbaugh-Williams v. Wal-Mart Stores*, 156 F.3d 581, 588-89 (5th Cir. 1998); *Favreau v. Chemcentral Corp.*, 1997 U.S. App. LEXIS 3804, 15-16 and n.2 (9th Cir. Feb. 27, 1997) (interpreting California state nondiscrimination law, for which courts "look to federal anti-discrimination legislation for guidance in interpreting," to forbid discrimination based on one's interracial marriage, citing *Parr*);Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 246 (2012) ("In the past thirty years, every case to consider a relational discrimination claim in the context of race has held that Title VII applies to such claims.").

B. Under Title VII's Language And Precedent, Discrimination Based On Same-Sex Relationships And Discrimination Based On Interracial Relationships Should Both Be Proscribed.

Evans is unaware of any serious argument why the consensus that Title VII bans discrimination founded on interracial relationships would not apply with equal force to discrimination because of one's same-sex relationship.

1. As A General Matter, The Same Principles Apply In Defining The Scope Of Proscribed Discrimination For Each

Of Title VII's Enumerated Characteristics, Especially With Respect To Race And Sex.

Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9 (justifying reliance on statements of legislative intent regarding the treatment of race in the workplace as authoritative regarding the appropriate treatment of sex). Additionally, the Supreme Court repeatedly has held that, absent a good reason otherwise, the standards concerning actionable conduct should be "harmonize[d]" among the categories enumerated in Title VII. *Faragher v. City of Boca Raton*, 524 U.S. 775, 787 n.1, 118 S. Ct. 2275, 2283 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*, 477 U.S. at 66 (citing racial harassment hostile work environment holdings as authority for construing Title VII to cover sexual harassment even without pecuniary loss to the employee).

Meritor endorsed this Court's ruling in *Henson* that harassment based on race and harassment based on sex should be treated the same under Title VII. *Meritor*, 477 U.S. at 67, quoting *Henson*, 682 F.2d at 902. And sexual harassment presents an especially compelling example of courts' insistence that all Title VII traits be treated the same, even if there are real world differences in the conduct in question. Showing that taunting on the basis of race, color, religion, or national

origin is "unwelcome" would seem not to be a major hurdle in most cases, while, in sexual harassment cases, "the question whether particular conduct was indeed unwelcome presents difficult problems of proof and turns largely on credibility determinations committed to the trier of fact." *Meritor*, 477 U.S. at 68. Nevertheless, the same elements for a hostile work environment claim apply across the Title VII traits. *Id.*; *Miller v. Kenworth of Dothan Inc.*, 277 F.3d 1269, 1275 (11th Cir. 2002).

2. The Two Contrary Decisions Are Not Persuasive.

Still today, the leading case rejecting the interracial relationship analogy is *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979), *overruled on other grounds, Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001). The court dismissed the argument that "a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners," by saying "that whether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes." *DeSantis*, 608 F.2d at 331. Immunizing discrimination because it is visited equally on men and women who are gay not only runs afoul of the "equal application" theory rejected in *Loving v. Virginia*, 388 U.S. 1, 87 S. Ct. 1817 (1967), but also the Title VII principle that an employer cannot escape

liability by equal treatment, in the aggregate, of those sharing a covered trait. In *Connecticut v. Teal*, 457 U.S. 440, 102 S. Ct. 2525 (1982), for example, the Court rejected an employer's suggestion that it should be able to raise an affirmative defense that it generally had treated blacks fairly and "reach[ed] a nondiscriminatory 'bottom line." *Id.* at 453. "We reject this suggestion, which is in essence nothing more than a request that we redefine the protections guaranteed by Title VII." *Id.*; *see also Manhart*, 435 U.S. at 708 ("The statute makes it unlawful 'to discriminate against any *individual*' . . . . The statute's focus on the individual is unambiguous.") (citation omitted; emphasis in original); *Venezia v. Gottlieb Mem'l Hosp., Inc.*, 421 F.3d 468 (7th Cir. 2005) (if a company has a supervisor who harassed a man because of his sex, the presence of another supervisor who harassed a woman because of her sex will not eliminate exposure under Title VII, but instead will double it).[9]

The other case squarely addressing the analogy of same-sex and interracial relationships for Title VII coverage purposes is *Partners Healthcare Sys. v.*

[9] Especially given that the employee was analogizing directly to the law on interracial marriage discrimination, it is odd that *DeSantis* would exonerate the equal mistreatment of lesbian and gay male employees, given the Supreme Court's unanimous rejection of Virginia's argument that, so long as whites and blacks were punished equally for intermarriage, there was no inequality. *See Loving*, 388 U.S. at 8; *see generally Developments in the Law: Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1580 n.164 (1989). ("*Developments*") ("Under the *DeSantis* court's reasoning, a ban on mixed race couples would not constitute race discrimination because the ban would apply evenhandedly to both white and nonwhite workers.").

Sullivan, 497 F. Supp.2d 42 (D. Mass. 2007), which expressed agreement with the logic of the plaintiff's argument but ultimately held that the First Circuit's anti-coverage decision in *Higgins* tied its hands. *Id.* at 44 n.3. The court explained that it adopted *Vickers*' limitation on sex stereotypes to "characteristics that were readily demonstrable in the workplace" only as "necessary to resolve *the tension created between Price Waterhouse*" and *Higgins*' anti-coverage ruling, specifically noting its lack of "authority to modify" either "controlling precedent." *Partners*, 497 F. Supp. 2d at 44 n.3 (emphasis supplied), citing *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). Of course, *Higgins* is not binding on this Court, and the *Partners* court's observation of its tension with *Price Waterhouse* demonstrates why it is not persuasive authority, either.

Based on logic, the statutory parallelism, and Supreme Court authority applying the same standards to assess race and sex discrimination under Title VII, the analogy to discrimination based on interracial relationships should hold, and the consensus that such discrimination is forbidden by Title VII should apply with equal force to discrimination based on one's intimate same-sex relationships.

IV. ANTI-COVERAGE DECISIONS FROM OTHER CIRCUITS ARE NOT CONTROLLING AND NOT PERSUASIVE.

The argument against Title VII's coverage of sexual orientation discrimination essentially boils down to uncritical reliance on other courts that have reached that conclusion, and the interrelated argument that Congress has not

passed explicit protections – interrelated because virtually all of the major anti-coverage decisions rely on Congressional inaction. These arguments should not be persuasive to this Court.

A. Anti-Coverage Decisions From Other Circuits Are Not Persuasive And Often Are Not Even Holdings.

This Court should not be concerned about cases from other circuits declaring sexual orientation discrimination outside Title VII's scope. First, it should be noted that, as is the case in this circuit, there is no definitive authority in the U.S. Supreme Court or the Fifth or District of Columbia Circuits regarding Title VII coverage of sexual orientation discrimination claims. See, *Burrows v. College of Cent. Fla.*, No: 5:14-cv-197, 2014 U.S. Dist. LEXIS 174122, at *9-10 (M.D. Fla. Dec. 17, 2014) ("the Supreme Court and the Eleventh Circuit have not specifically addressed this issue"); *Polly v. Houston Lighting & Power Co.*, 825 F. Supp. 135, 137 n.2 (S.D. Tex. 1993) (citing only cases from other circuits declaring Title VII inapplicable); *TerVeer*, 34 F. Supp. 3d at 116 (approving a Title VII claim based on sexual orientation discrimination, noting that "the Court of Appeals for the District of Columbia has held that to survive a motion to dismiss under Rule 12(b)(6), all a complaint need state is: 'I was turned down for a job because of my race.'") (citation omitted).

In addition, many of the cases cited in courts throughout the country as establishing that Title VII does not cover sexual orientation discrimination do not

involve holdings to that effect at all, especially oft-cited cases from the Fourth and Eighth Circuits. In the leading Eighth Circuit case, *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989), the plaintiff, a black gay man, claimed his employer "discharged him on the basis of his race" because "similarly situated white homosexual employees . . . were not harassed or terminated as he had been." *Id.* at 70. The opinion of the Eighth Circuit *says* that "Title VII does not prohibit discrimination against homosexuals," but *holds* – on plaintiff's only claim, which was race discrimination (brought under both Title VII and 42 U.S.C. § 1981) – that he failed to allege "that other similarly situated white employees were treated differently. He did not claim that the other white, alleged homosexuals behaved as he did (openly discussed their sex lives while at work)" and were treated better. *Id.*[10]

Two 1996 Fourth Circuit cases cited as anti-coverage cases simply are not about sexual orientation discrimination. *Wrightson v. Pizza Hut of America, Inc.*, 99 F.3d 138, 143 (4th Cir. 1996), and *Hopkins v. Baltimore Gas & Electric Co.*, 77 F.3d 745, 751-52 (4th Cir. 1996).[11] They are pre-*Oncale* cases that held that same-

[10] Despite not even being a case about sexual orientation discrimination, *Williamson* has been cited as authoritative support for Title VII's lack of coverage thereof by leading anti-coverage decisions in the First, Second, Third, and Sixth Circuits (*Higgins*, *Simonton*, *Bibby*, and *Dillon*, respectively; see *infra* at 45-48).

[11] Of course, sexual orientation discrimination has little to do with same-sex sexual harassment, although it is *sometimes* the case that the target's homosexuality is a reason for the harasser's selection . But often it is not. See *Caldwell v. KFC*

sex sexual harassment can be actionable under Title VII. The anti-coverage dicta in *Wrightson* is supported only by citations to *DeSantis* and the *Williamson* dicta. *Hopkins* cites absolutely no cases to support the proposition that "Title VII does not prohibit conduct based on the employee's sexual orientation, . . .[which is based] not at the fact that the employee is a man or a woman." 77 F.3d at 752. Worse yet, that passage appears in Section II of the opinion, where Judge Neimeyer is writing for himself, not the court. *See Id.* at 747 ("Niemeyer, Circuit Judge, writing for the court only in parts I, III, and IV").

Some leading anti-coverage decisions rely on assumptions about the role of Congressional intent rejected by *Oncale*. This Court in *Glenn* already has pointed out that the rulings in *Ulane v. Eastern Airlines, Inc.*, 742 F.2d 1081 (7th Cir. 1984) and *Holloway v. Arthur Andersen, Inc.*, 556 F.2d 659 (9th Cir. 1977) have been eviscerated – not only because of their discredited treatment of gender – but also in their "reliance on the presumed" mindset of Congress, which is "inconsistent with *Oncale*." *Glenn*, 663 F.3d at 1318 n.5. This is significant, because both the leading anti-coverage decisions of the Seventh and Ninth Circuits rely heavily on the view of Congressional intent espoused in *Ulane* and *Holloway*, respectively, for their holdings that sexual orientation discrimination is not within

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Corp., 958 F. Supp. 962, 967 n.2 (D.N.J. 1997) (allegations were not that sexual harassment occurred "because of plaintiff's sexual orientation" but because "his superior finds him sexually attractive.").

Title VII's scope. *Hamner*, 224 F.3d at 704, 707 (repeatedly citing *Ulane*); *Ulane*, 742 F.2d at 1084-86 (repeatedly citing Congressional intent regarding the scope of Title VII); *DeSantis*, 608 F.2d at 329, citing *Holloway*, 566 F.2d at 662-63.

Other leading anti-coverage cases lack persuasive value because they fail even to consider arguments in favor of coverage, they rely on their view of what Congress intended, and/or they support their ruling by uncritically citing other cases, whether or not they are actual holdings. A primary example is the First Circuit's decision in *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999). There, Higgins tried to argue on appeal "a 'sex-plus' theory" under *Phillips* and a sex-stereotyping theory under *Price Waterhouse*. *Id.* at 259. The First Circuit held these arguments to be waived, because, *inter alia*, Higgins "made no mention of *Phillips*, *Price Waterhouse*, or their respective progeny" to the District Court. *Id.* at 260. Unwilling to consider the primary contrary arguments, the *Higgins* court proceeded to declare, "We regard it as settled law that, as drafted and authoritatively construed, Title VII does not proscribe harassment simply because of sexual orientation." *Id.* at 259. To supports its anti-coverage position as "authoritatively construed . . . settled law," the court cited only the *Williamson* dicta and the dissenting portion of Judge Neimeyer's *Hopkins* decision (without acknowledging it as not speaking for the court). *Id.* While the anti-coverage ruling of *Higgins* may have to be followed by courts within the First Circuit, a decision

that does not consider the two primary contrary arguments against its position should not be of any persuasive value outside that circuit.

Similarly, the Second Circuit's leading anti-coverage decision, *Simonton*, 232 F.3d 33, also deemed the plaintiff's sexual stereotyping theory waived. *See Centola*, 183 F. Supp. 2d at 409 n.7 ("In both *Higgins* and *Simonton*, the Circuit Courts refused to consider arguments based upon a sexual stereotyping theory at the appellate level because the plaintiffs had not properly raised these arguments first with the trial courts below."). The court instead relied on "Congress's rejection, on numerous occasions, of bills that would have extended Title VII's protection to people based on their sexual preferences." *Simonton*, 232 F.3d at 35, citing *Ulane*, 742 F.2d at 1085-86. The court acknowledges that reliance on congressional inaction generally "is not always a helpful guide" but finds it to be helpful in this instance because "of consistent judicial decisions refusing to interpret 'sex' to include sexual orientation," citing only *DeSantis*, and the dicta in *Williamson* and *Wrightson*. *Simonton*, 232 F.3d at 35-37.[12] A year later, the Third

[12] *Simonton* also holds that "[t]he proscribed differentiation under Title VII, therefore, must be a distinction based on a person's sex, not on his or her sexual affiliations." 232 F.3d at 36 (citation omitted). Fair enough. But a company policy tolerating men having extramarital relations, but not women, would violate Title VII; so should a policy tolerating men who have sex with women but not women have sex with women. *See Platner v. Cash & Thomas Contractors*, 908 F.2d 902, 904 (11th Cir. 1990) (even though "sexual activity, rather than sexual identity as such, is not a discriminatory basis for employment action under Title

Circuit similarly cited both *Simonton* and *Higgins* (and the *Williamson* dicta) as support for its holding that sexual orientation is outside Title VII's scope. *Bibby*, 260 F.3d at 261. Four years after *Bibby*, the Tenth Circuit's sole reason for holding that a lesbian's 'claim that "she was discriminated against because she is a heterosexual" was not encompassed within "Title VII's protections" was Congressional inaction, the court citing *Bibby*, *Simonton*, and the *Wrightson* dicta for that point. *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005).

The Sixth Circuits' leading anti-coverage decisions are *Vickers*, discussed *supra*, and *Dillon v. Frank*, No. 90-2290, 1992 U.S. App. LEXIS 766 (6th Cir. Jan. 15, 1992). But *Dillon* seemed to suggest – repeatedly – that Dillon's legal fate would have different if he had offered allegations that "his co-workers would have treated a similarly situated woman any differently." *E.g.*, *Id.* at *26; see also *id.* at 27-28. Thus, *Dillon* could support the notion that a properly pled complaint could survive if it specifically alleges that men sexually involved with men were treated worse than women sexually involved with men.

In short, what has been superficially portrayed as a thorough judicial consensus regarding Title VII's coverage of sexual orientation discrimination is anything but.

VII [citation]. . . . an employer may not, simply on grounds of gender, punish the female but not the male participant in a real or suspected inter-employee liaison.").

B. Congressional Inaction – In The Face Of Only Intermediate Appellate Court Decisions – Is An Improper Statutory Interpretation Approach To The Sex Discrimination Prohibition In Title VII.

Reliance on Congressional inaction is by far the most frequent, and indeed really the only substantive argument invoked by anti-coverage courts. But whether one looks at statutory interpretation principles specific to the sex discrimination provision of Title VII, or statutory interpretation principles generally, the argument fails miserably.

1. While The Supreme Court Has Used Different Statutory Interpretation Methods For Different Statutes, The Sex Discrimination Provision Of Title VII Must Be Read, Under *Oncale*, To Encompass All Instances Of Discrimination "Because Of Such Individual's . . . Sex"

As a general matter, the Supreme Court has taken a dim view of reliance on Congressional inaction as a tool of statutory interpretation. There are many Supreme Court cases that rail against the dangers of relying on congressional inaction in the face of a clear Supreme Court interpretation of a statute. *E.g.*, *Pension Ben Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650, 110 S. Ct. 2668, 2678 (1990); *Zuber v. Allen*, 396 U.S. 168, 185 n.21, 90 S. Ct. 314, 324 n.21 (1969); *Girouard v. United States*, 328 U.S. 61, 69-70, 66 S. Ct. 826, 830 (1946). But, then again, there are contrary cases where the court has placed some weight on Congressional inaction in the face of a *clear Supreme Court interpretation* of a statute. E.g., *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401 (2015). As a result,

it is prudent to adhere to the Supreme Court dictates specifically regarding how to interpret Title VII, especially its sex discrimination prohibition.

Anti-coverage decisions have rejected arguments like Evans' because they have the effect of, or would result in, adding sexual orientation to Title VII. *E.g.*, *Vickers*, 453 F.3d at 764 ("In all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory if this claim is allowed to stand"); *Partners Healthcare Sys. v. Sullivan*, 497 F. Supp. 2d 29, 39 (D. Mass. 2007) (court compelled to reject the "interracial relationship" analogy because "[a]dopting such a theory would serve to protect sexual orientation in any context where sex discrimination is protected, including under Title VII and Amendment XIV analysis."). That results-oriented approach is exactly contrary to the Supreme Court's jurisprudence in interpreting Title VII, which is to follow the words of the statute, and let the chips fall where they may. For example, in *Lewis v. City of Chicago*, 560 U.S. 205, 130 S. Ct. 2191 (2010), the Court acknowledged that "The City and its amici warn that our reading *will result in* a host of practical problems for employers and employees alike." *Id.* at 216 (emphasis added). To say that the argument was unpersuasive would be an understatement: "Our charge is to give effect to the law Congress enacted. If that effect was unintended, it is a problem for Congress, not one that federal courts can fix." *Id.* at 217; *see also id.*

at 215 ("It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.") (citing *Oncale*).

Another employer – who retaliated against the employee by firing his fiancée – argued that "prohibiting reprisals against third parties *will lead to* difficult line-drawing problems concerning the types of relationships entitled to protection," placing "the employer at risk any time it fires any employee who happens to have a connection to a different employee who filed a charge with the EEOC." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174, 131 S. Ct. 863, 868 (2011) (emphasis added). The Court showed sympathy for the policy implications ("we acknowledge the force of this point," *id.*), but rejected the argument as contrary to the words of Title VII: "[W]e adopted a broad standard in *Burlington* because Title VII's antiretaliation provision is worded broadly. We think there is no textual basis for making an exception to it for third-party reprisals, and a preference for clear rules cannot justify departing from statutory text." *Id.* at 175.

And just last term, the Supreme Court again refused to restrict the scope of Title VII liability by imposing a requirement on plaintiffs not supported by the statute. The Court held that an employer violates Title VII if he thinks that an applicant requires a religious accommodation and does not hire the applicant out of a "desire to avoid the prospective accommodation." *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015). The employer urged the Court to

adopt a rule, endorsed by the Tenth Circuit, that "would require the employer to have actual knowledge of a conflict between an applicant's religious practice and a work rule." *Id.* The Court rejected the entreaty to limit the scope of Title VII liability, noting that such an "approach is the one that inheres in most incorrect interpretations of statutes: It asks us to add words to the law to produce what is thought to be a desirable result. That is Congress's province." *Id.*; see also *id.* at 2035 (Alito, J., concurring in the judgment) ("The relevant provisions of Title VII, however, do not impose the notice requirement that formed the basis for the Tenth Circuit's decision.").

Indeed, the Supreme Court has rejected warnings about the consequences of applying the words of Title VII literally even when the Court acknowledged potential problems resulting from a literal interpretation. By contrast, accepting Evans' argument creates no problems. Even many anti-coverage decisions have waxed eloquently about the utter indefensibility of sexual orientation discrimination. *See Bibby*, 260 F.3d at 265; *Simonton*, 232 F.3d at 35; *Higgins*, 194 F.3d at 259.

While it generally is a disfavored practice to engraft exceptions onto statutes, it is especially so regarding Title VII, where Supreme Court holdings repeatedly have reaffirmed the principle that courts should entertain all claims that "meet[] the statutory requirements" of Title VII. *See Oncale*, 523 U.S. at 80. One

can be reasonably sure that Justice Scalia and a unanimous *Oncale* Court, in dismissing the relevance of the motivations of the 88th Congress that passed Title VII, were not inviting courts deciding coverage issues to shift their focus to what later sessions of Congress did *not* enact into statutory law.

Indeed, the Court's actual concern in interpreting Title VII is to ensure that some judge-made rule does not result in insulating from liability conduct falling within the language of Title VII. The Supreme Court repeatedly has struck down judicial barriers and rules, unsupported by statutory language, that had the effect of potentially immunizing conduct unlawful under Title VII. *See Reeves v. Sanderson Plumbing Products, Inc*., 530 U.S. 133, 148, 120 S. Ct. 2097, 2109 (2000) (an employee is entitled to a jury if the employee refutes the employer's pretextual reason(s), pointing out that "[t]o hold otherwise would be effectively to insulate an entire category of employment discrimination cases from review."). Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 122 S. Ct. 992 (2002), the Court unanimously rejected the Second Circuit's use of a heightened pleading standard for Title VII cases. *See Id.* at 514 (pointing out that it would be wrong to dismiss"claims upon which relief could be granted under Title VII and the ADEA."); *see also Desert Palace, Inc. v. Costa*, 539 U.S. 90, 95, 123 S. Ct. 2148, 2152 (2003) (unanimously casting aside the law of no fewer than four circuits that had held that a plaintiff must present "direct evidence" to establish "mixed motive"

liability). So whatever flexibility lower courts might have to interpret other statutes by reference to Congressional inaction in the face of court decisions, when it comes to Title VII, a court's job is to entertain all claims that fall within "the statutory requirements," *Oncale*, 523 U.S. at 80, and not limit claims to only those "necessary to achieve what we think Congress really intended." *Lewis*, 560 U.S. at 215.

2. The Judicial And Legislative History Of Title VII Does Not Allow For Reliance On Congressional Inaction.

There is almost no authority for relying on Congressional inaction in the face of only intermediate appellate authority. The *two* known times that the Supreme Court has relied on Congressional inaction in the face of Courts of Appeals decisions do not resemble in the slightest the Congressional track record with respect to explicit protections for LGBT workers. Last June, as an alternative holding, the Court did find Congressional inaction significant when Congress passed major amendments to the Federal Housing Act and did not change the statute's operative language, knowing that nine Courts of Appeals had held that disparate impact liability was available under the statute. *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). The Court cited one supporting case, *Manhattan Properties, Inc. v. Irving Trust Co.*, 291 U.S. 320, 336, 54 S. Ct. 385, 388 (1934), "where the Courts of Appeals had reached a consensus interpretation of the Bankruptcy Act and Congress had

amended the Act without changing the relevant provision."[21] *Inclusive Cmtys.*, 135 S. Ct. at 2520.

First, it should be noted that, in *Inclusive Cmtys.*, Congressional inaction was an alternative holding and seemingly the weaker alternative at that. Instead, the Court seemed more impressed by provisions that Congress actually passed, which provisions made sense only if disparate impact liability existed. The Court said that "Further *and convincing* confirmation of Congress's understanding that disparate-impact liability exists under the FHA is . . . amendments [that] included three exemptions from liability that assume the existence of disparate-impact claims." *Inclusive Cmtys.*, 135 S. Ct. at 2520 (emphasis supplied). For example, one amendment specifically excluded from liability any housing denial based on a drug conviction. Obviously, a statute that proscribes only disparate *treatment* based on race, color, national origin, religion, sex, familial status, and disability, does not need an amendment regarding one's criminal history if disparate impact liability is nonexistent. *Id.* at 2520-21 (the drug conviction amendment would not "make sense if the FHA encompassed only disparate-treatment claims.").

[21] The *Inclusive Cmtys*. court cited another case, but one not relevant to the issue of interpreting Congressional inaction in the face of only Courts of Appeals rulings, because it involved Congress "implicitly adopt[ing] *this Court's* construction of the statute." 135 S. Ct. at 2520 citing *Forest Grove Sch. Dist. v. T.A.*, 557 U.S. 230, 244 n.11, 129 S. Ct. 2484, 2494 (2009) (emphasis supplied).

Both *Inclusive Cmtys*. and *Manhattan Properties* measure Congressional inaction at the point that Congress is undertaking significant amendatory action on the statute in question. *Inclusive Cmtys.'* focus on Congress is the action it took in 1988. 135 S. Ct. at 2519-22. At issue in *Manhattan Properties* was bankruptcy treatment, under an 1898 law, of claims for loss of rent or for damages stemming from abrogation of leases. Congress repeatedly amended the act after the circuit courts issued consistent interpretations; by the time of the passage of the 1932 amendment, six courts of appeals had ruled the same way. *See* 291 U.S. at 335-36. Under these circumstances, the Court declined to revisit the consistent interpretation blessed by Congress, which had repeatedly revisited the statute.

So the parallel measuring point for Congressional "inaction" on Title VII would be the Civil Rights of 1991, the last significant amendment to Title VII.[22] At that time, only one circuit court had ruled that Title VII excludes coverage of sexual orientation discrimination: *DeSantis*.[23] But at that time, the most

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[22] e. christi cunningham, *ARTICLE: The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 501 n13 (1998) ("Since its enactment, Title VII has had two major revisions[:] The Equal Employment Opportunity Act of 1972 . . . [and] The Civil Rights Act of 1991 . . ."); Noelle C. Brennan, COMMENT: Hostile Environment Sexual Harassment: The Hostile Environment of a Courtroom," 44 DEPAUL L. REV. 545, 551 (1995) ("Title VII was most recently amended by the Civil Rights Act of 1991.").

[23] See I. Bennett Capers, *NOTE: SEX(UAL ORIENTATION) AND TITLE VII*, 91 COLUM. L. REV. 1158, 1176 (1991) ("The leading case holding that Title VII does

significant case concerning whether LGBT employees could invoke the sex discrimination protections of Title VII was not the Ninth Circuit's decision, but instead the Supreme Court's decision in *Price Waterhouse* (and its forbears that also condemn sex-based criteria for employment decisions). It would have been obvious to Congress in 1991 that LGBT employees would utilize the *Price Waterhouse* decision if Congress overruled only the Court's mixed-motive ruling while leaving intact the holding regarding discrimination based on gender stereotypes – which is exactly what Congress did.[24] *See* Capers, 91 COLUM. L. REV. at 1183 (employee whose "same-sex activity" was his only defiance of "gender expectations" should prevail under a "sex stereotyping analysis" if he was fired "solely because he does not conform to [the employer's] stereotype of what a 'real' man should be."); *The Supreme Court, 1988 Term: Leading Cases: III. Federal Statutes and Regulations*, 103 HARV. L. REV. 320, 393 n.59 (1989)(noting that the American Psychological Association amicus brief in *Price Waterhouse* discussed some stereotypes of men as strong, independent, competitive, and self-

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not prohibit employment discrimination based on sexual orientation is *DeSantis* . . .").

[24] Moreover, in its passage of the Americans with Disabilities Act the year before in 1990, Congress included a specific exclusion of transsexuality and homosexuality from the statute's protections. 42 U.S.C. § 12211(a). The Supreme Court has placed great weight on the significance of what amendments were not made in the Civil Rights Act of 1991, contrasted with what was passed in the ADA. *Univ. of Tex. Southwestern Med. Ctr v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 129 S. Ct. 2343 (2009).

confident and women as weak, passive, dependent, and uncompetitive, and the "argument that discrimination against gay men and lesbians is also based on these sexually stereotypical notions"); *Developments*, 102 Harv. L. Rev. 1508, 1580 and n.16) (urging lesbian and gay workers to "emphasize the sexually stereotypical attitudes that lead employers to ban gay and lesbian workers").

In sum, courts are not free to ignore the Supreme Court's jurisprudence on how to interpret Title VII and especially its sex discrimination provision, and therefore all claims that meet the statutory language must be entertained. Even if courts were free to consider Congressional inaction on passing explicit LGBT protections in the face of Courts of Appeals decisions, the legislative and judicial history of Title VII does not match the pattern of the two cases that attached significance to Congressional inaction when the Supreme Court has not ruled on the issue.

V. THE DISTRICT COURT COMMITTED OTHER ERRORS.

Evans calls the Court's attention to other errors of the District Court to ensure her rights are preserved, although it is unclear to what extent those errors colored the decisionmaking process below, beyond the errors discussed above.

The District Court faulted Evans for not citing a comparator. DE 4 at 5 n.5. This Court recently reversed a district court that had tried to require the plaintiff "to point to substantially similar comparators who had received different

treatment." *Surtain v. Hamlin Terrace Found*., 789 F.3d 1239, 1243 (11th Cir. 2015). This Court held that "to state a race-discrimination claim under Title VII, a complaint need only 'provide enough factual matter (taken as true) to suggest intentional race discrimination.'" *Id.* at 1246 (citations omitted). The complaint "need not allege facts sufficient to make out a classic *McDonnell Douglas* prima facie case" because that "framework is an evidentiary standard, not a pleading requirement." *Id.*, citing *Swierkiewicz*, 534 U.S. at 510-11.

Also, the District Court misunderstood what is required to bring a retaliation claim, by requiring that the challenged conduct actually be unlawful under Title VII. DE 4 at 10. ("But there evidently was *no* protected activity here. Again, plaintiff was complaining about an employment practice (homosexual or sexual orientation discrimination) that is not unlawful under Title VII."). It is well-established that that is not the standard: "Even if an employment practice is not as a matter of fact unlawful, a plaintiff can establish a prima facie case of Title VII retaliation 'if he shows that he had a good faith, reasonable belief that the employer was engaged in unlawful employment practices . . . .'" *Dixon v. Hallmark Cos.*, 627 F.3d 849, 857 (11th Cir. 2010) (citation omitted); *Branscomb v. Sec'y of the Navy*, 461 F. App'x 901, 906 (11th Cir. 2012) (fact that plaintiff was not a "disabled person" or a "qualified individual" under the disability statutes "was not

dispositive of [his] retaliation claim, which required only a reasonable belief that the Navy had violated" those statutes).

Evans easily satisfies this standard. It is now settled law that discrimination based on gender-nonconforming appearance and demeanor is unlawful under Title VII, and there is a compelling case – *especially* in a circuit with no contrary authority – that sexual orientation discrimination is discrimination "because of such individual's . . . sex" under Title VII. Especially persuasive are the rulings in favor of retaliation claims by employees who complained of sexual orientation discrimination in cases brought in the Second and Ninth Circuits, which already had established case law at the time holding that Title VII did not cover sexual orientation discrimination. *Dawson v. Entek Int'l*, 630 F.3d 928, 936-37 (9th Cir. 2011); *Martin v. N.Y. State Dep't of Corr. Servs*., 224 F. Supp. 2d 434, 448 (N.D.N.Y. 2002). The *Martin* court refused to classify as unreasonable the employee's belief about Title VII's applicability simply because the employee, a non-lawyer, was not aware of long-standing, contrary Second Circuit precedent. 224 F. Supp. 2d at 448 (citing the absence of legal support for "imput[ing] to non-lawyers" such knowledge); *see generally Moyo v. Gomez*, 40 F.3d 982, 984, 985 (9th Cir. 1994) (whether the employee's belief "is reasonable" should be "judged by a standard . . .] that makes due allowance [] for the limited knowledge

possessed by most Title VII plaintiffs about the factual and legal bases of their claims.").

Other errors included the District Court's pure speculation about the timeliness of Evans' EEOC charge and whether the allegations in her complaint had the requisite similarity to the EEOC's investigation. *See generally Griffin v. Carlin*, 755 F.2d 1516, 1522 (11th Cir. 1985) (reversible error to dismiss portions of complaint that "should have been encompassed in a reasonable investigation of this charge"). Lastly, an overarching error was the failure to grant leave to amend, despite Evans' request, because of the District Court's erroneous belief that her complaint is legally unsalvageable. See DE 4 at 12, citing *Langlois v. Traveler's Ins. Co.*, 401 F. App'x 425, 426-27 (11th Cir. 2010). Because the actual holding of *Langlois* is that a pro se complainant *should* be given leave to amend where there is a viable claim, the dismissal with prejudice was error. And in that respect, there was a compound error, because the District Court dismissed the individual defendants. While it is true that no Title VII claims lies against them, the unlawfulness of discrimination based on gender non-conforming appearance and demeanor is so well–established that Evans could allege Section 1983 claims against them in their individual capacities, and she should be allowed to do so.

CONCLUSION

This Court should reverse the District Court's cramped interpretation of what constitutes discrimination "because of . . . sex" and remand with instructions to entertain Evans' claims as alleged, and other claims that she could bring by amendment.

Respectfully submitted,

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CERTIFICATION OF COMPLIANCE

I hereby certify that the foregoing Appellant's Opening Brief is 13,812 words, exclusive of the corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, and any certificates of counsel.

So certified this 7th day of January, 2016.

Gregory R. Nevins

CERTIFICATION OF SERVICE

I hereby certify that on January 7th, 2016, I electronically filed the foregoing document with the Clerk of Court. I also mailed the document to the following recipients:

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