IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff*, v. SCOTT MEDICAL HEALTH CENTER, P.C., *Defendant*.	Civil Action No. 2:16-cv-00225

TENDERED BRIEF OF *AMICUS CURIAE*
LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC.
IN SUPPORT OF PLAINTIFF'S OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS

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STATEMENT OF INTEREST[1]

Formed in 1973, Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is the nation's oldest and largest legal organization committed to achieving full recognition of the civil rights of lesbian, gay, bisexual, and transgender ("LGBT") people and people living with HIV through impact litigation, education, and public policy work. Lambda Legal has served as counsel of record or *amicus curiae* in some of the most important cases regarding the rights of LGBT people and people living with HIV. *See*, *e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 133 S. Ct. 2675 (2013); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Bragdon v. Abbott*, 524 U.S. 624 (1998); *Romer v. Evans*, 517 U.S. 620 (1996).

Lambda Legal also has striven to ensure employment fairness for LGBT people by serving as counsel of record or *amicus curiae* in litigation addressing the application of federal law to discrimination against LGBT individuals. *See*, *e.g.*, *Zarda v. Altitude Express, Inc.*, No. 15-3775 (2d Cir.) (*amicus*) (pending); *Hively v. Ivy Tech Cmty. Coll.*, No. 15-1720 (7th Cir.) (counsel) (argued Sept. 30, 2015); *Evans v. Georgia Reg'l Hosp.*, No. 15-15234 (11th Cir.) (counsel) (pending) *Glenn v. Brumby*, 663 F.3d 1312 (11th Cir. 2011) (counsel); *Rene v. MGM Grand Hotel*, 305 F.3d 1061 (9th Cir. 2002) (*en banc*) (*amicus*) *Roberts v. Clark Cty. Sch. Dist.*, No. 15-CV-0388 (D. Nev.) (*amicus*) (pending); *Hall v. BNSF Ry. Co.*, No. C13-2160, 2014 WL 4719007 (W.D. Wash. Sept. 22, 2014) (*amicus*); *TerVeer v. Billington*, 34 F. Supp. 3d 100 (D.D.C. 2014) (*amicus*); *Lopez v. River Oaks Imaging & Diagnostic Grp.*, 542 F. Supp. 2d 653 (S.D. Tex. 2008) (counsel).

[1] No counsel for a party authored this brief, in whole or in part, and no person other than *amicus curiae* and their counsel made any monetary contribution to fund the preparation or submission of this brief.

INTRODUCTION

In enacting Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., Congress clearly set out an overriding societal priority to extinguish discrimination in employment "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). While some lower courts have been hesitant to give these words their full meaning, the Supreme Court has not. Instead, the Court has broadly and consistently condemned "sex-based" discrimination in the workplace, recognizing that Title VII was "intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (emphasis added). By alleging that Dale Baxley was discriminated against on the basis of sex because of the harassment and hostile work environment he endured as a result of his sexual orientation, Plaintiff, the Equal Employment Opportunity Commission ("EEOC"), has clearly stated a claim for which relief can be granted under Title VII's prohibition of sex discrimination.

The EEOC has aptly articulated why discrimination on the basis of sexual orientation is necessarily discrimination on the basis of sex; namely, that: (1) sexual orientation discrimination inescapably involves sex-based considerations; (2) discrimination based on a man's same-sex relationship is sex discrimination just as discrimination against a man in an interracial relationship is race discrimination; and (3) discrimination against lesbian, gay, and bisexual people is based on gender norms limiting the sex of the person with whom a man or a woman is "supposed to" have romantic or sexual relationships.

In this brief, *amicus* does not seek to duplicate the EEOC's arguments. Instead, *amicus* will provide the Court with further context for these theories and discuss how court pronouncements, like the one in *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257 (3d Cir. 2001) (subsequently restated in *Prowel v. Wise Bus. Forms, Inc.*, 579 F.3d 285 (3d Cir.

2009)), "that Title VII does not prohibit discrimination based on sexual orientation," 260 F.3d at 261, are inconsistent with antecedent and subsequent Supreme Court authority about how to properly interpret Title VII's proscription on sex discrimination. This Court should decline to follow *Bibby* and *Prowel* not only because of their inconsistency with Title VII's clear statutory language but also due to their lack of harmony with Supreme Court precedents. *See United States v. Tann*, 577 F.3d 533, 542 (3d Cir. 2009) ("A panel opinion which lacks harmony not only with subsequent Supreme Court authority but also with antecedent Supreme Court authority has [no] greater claim to permanence as circuit precedent than a panel decision undercut by subsequent Supreme Court authority when announced.").

Amicus also urges the Court to properly interpret Title VII's prohibition on sex-based discrimination by focusing on the law's clear statutory language and not on groundless arguments about congressional inaction.

Finally, *amicus* urges the Court to reject efforts to create a "gay exception" to Title VII's sex discrimination prohibition, in light of the new legal landscape surrounding the legal protections afforded to lesbians and gay men by the Constitution. Such consideration is necessary both to "achieve the full promise of liberty," *Obergefell v. Hodges*, 135 S. Ct. 2584, 2600 (2015), and to construe Title VII properly and achieve its goal of ending workplace decisions and harassment that take into account an employee's sex.

For these and the following reasons, the Court should deny Defendant's motion to dismiss and hold that Title VII's proscription on sex-based discrimination necessarily encompasses discrimination on the basis of sexual orientation.

ARGUMENT

I. TITLE VII'S PROHIBITION OF SEX DISCRIMINATION NECESSARILY ENCOMPASSES DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION.

For at least three reasons, an employee necessarily experiences discrimination "because of such individual's . . . sex," 42 U.S.C. § 2000e-2, when an employee is subjected to antigay discrimination. First, under a basic sex discrimination (or "sex-plus") theory,[2] such discrimination necessarily involves sex-based considerations because the discrimination endured by a man attracted to men is not suffered by any woman with the same attraction. Second, just as discrimination against an employee who is romantically involved with someone of a different race has universally been recognized as race discrimination barred by Title VII, discrimination against an employee who is attracted to someone of the same sex must be recognized as sex discrimination equally barred by that law. Finally, under a gender stereotyping theory, sexual orientation discrimination is sex discrimination because gay men do not conform to the stereotype that men should only be attracted to women.

A. When Employers Discriminate Based On Sexual Orientation, They Inexorably Consider An Employee's Sex, In Violation Of Title VII.

Employment discrimination on the basis of sexual orientation inherently involves differential treatment based on an employee's sex, in violation of Title VII, because one cannot consider an individual's sexual orientation without taking into account that individual's sex. "[S]exual orientation is inseparable from and inescapably linked to sex." *Baldwin v. Foxx*, Appeal No. 0120133080, 2015 WL 4397641, at *5 (E.E.O.C. July 16, 2015); *accord Videckis v.*

[2] "Sex-plus" is the term for discrimination occurring not categorically against all members of one sex, but only those members sharing a certain trait (for instance, having young children), when members of the other sex who share that trait suffer no discrimination. Sex-plus discrimination is unquestionably barred by Title VII. *See Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

Pepperdine Univ., No. 15-cv-0298, 2015 WL 8916764, at *7 (C.D. Cal. Dec. 15, 2015). Conceptually, this is a straightforward formulation. The Court need only ask the simple question whether the employee would have been discriminated against if the employee had been of a different sex. *See City of L.A. Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (articulating the controlling, yet "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) (quotation omitted); *see also Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682-83 (1983) (applying *Manhart*'s "simple test"). If the employee would have been treated differently had they been of the other sex, then the discrimination plainly was because of such individual's sex.

Numerous courts have ruled in favor of lesbian or gay Title VII plaintiffs, using the simple logic noted above. *See*, *e.g.*, *Isaacs v. Felder Servs., LLC*, No. 13-cv-0693, 2015 WL 6560655, at *3 (M.D. Ala. Oct. 29, 2015) ("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.") (alterations, citation omitted); *Hall*, 2014 WL 4719007, at *3; *Koren v. Ohio Bell Tel. Co.*, 894 F. Supp. 2d 1032, 1038 (N.D. Ohio 2012); *Heller v. Edgewater Country Club*, 195 F. Supp. 2d 1212, 1223 (D. Or. 2002); *see also Videckis*, 2015 WL 8916764, at *8.

Yet, in *Bibby*, without much analysis[3] and mostly relying on congressional inaction, the court simply concluded that "that Title VII does not prohibit discrimination based on sexual orientation." 260 F.3d at 261. The *Bibby* Court's articulation disregards the "inescapabl[e]" link

[3] As the EEOC points out, it appears all the parties in *Bibby* assumed there was a legal distinction between discrimination "because of sex" and sexual orientation discrimination. *See* EEOC's Br. at 19.

between sexual orientation and sex, *Baldwin*, 2015 WL 4397641, at *5, and fundamentally misapprehends the nature of the inquiry courts are required to perform when evaluating sex discrimination claims.

The articulation announced in *Bibby* and subsequently restated in *Prowel* conflicts with the Third Circuit's own prior declarations by taking "much too narrow a view of what can constitute sex-based discrimination under Title VII." *Tomkins v. Pub. Serv. Elec. & Gas Co.*, 568 F.2d 1044, 1047 n.4 (3d Cir. 1977). It simply ignores the fact that, to find a Title VII violation, "[i]t is only necessary to show that gender is a substantial factor in the discrimination." *Id.* That is established if a female employee shows that "'had [she] been a man she would not have been treated in the same manner.'" *Id.* (quoting *Skelton v. Blazano*, 424 F. Supp. 1231, 1235 (D.D.C. 1976)).

The EEOC explains how, after *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998), taking adverse action against or harassing a man (but not a woman) romantically involved with men is sex discrimination, irrespective of the goals of the Congress that passed Title VII. There are two points worth noting about the workplace in *Oncale*: it included other men, and only men. *See Rene,* 305 F.3d at 1066 (*en banc*); *Davis v. Coastal Int'l Sec., Inc.*, 275 F.3d 1119, 1124 (D.C. Cir. 2002). Joseph Oncale stated a claim that he was discriminated against based on his male gender despite the fact that only men held jobs at his workplace, and there is no indication that any of the other men were harassed. But his being male was an essential component of why he was harassed, and that was sufficient; he did not need to claim discrimination against all men, or that men were treated worse than women were. Thus, when the *Bibby* Court pointed out that John Bibby did not argue that "as a man he was treated differently than female co-workers," that statement is literally true; John Bibby did not articulate

such an argument. *See Bibby*, 260 F.3d at 264; EEOC's Br., Ex. 1. But *Bibby* should not be read to foreclose the argument that a man is discriminated against because of his sex if he is treated worse than his female coworkers who share his attraction to men.[4]

The fundamental flaw in *Bibby*'s analysis was that the Court failed to consider what constitutes discrimination "because of such individual's . . . sex," and instead treated sexual orientation discrimination as separate from sex discrimination, rather than a form of it. This is a likely byproduct of more recent times, when explicit sexual orientation protections are found in many, more recent laws. But Title VII was passed in 1964; arguing that "sex" in Title VII excludes sexual orientation discrimination would only make sense if, for example, Title II, passed the same year, had proscribed discrimination based on both "sex" and "sexual orientation." Of course, that is not the case; indeed, the concept of "sexual orientation" discrimination as a separately-identified category of actionable bias was not a part of American law in 1964. The first ordinance and state statute expressly banning such discrimination in private employment were passed respectively in East Lansing, Michigan in 1972, and in Wisconsin in 1982. Gary Mucciaroni, *Same Sex, Different Politics: Success and Failure in the Struggles over Gay Rights* 213 n.12 (2008). Thus, the absence of the words "sexual orientation" signifies nothing, and courts should give effect to the statute's command of proscribing all sex-based considerations. *See Smiley v. Citibank (South Dakota) N.A.*, 517 U.S. 735, 746 (1996) ("A

[4] Indeed, John Bibby's argument was that there should be no "sexual orientation" exception to who can claim sexual harassment, and on that point, the Third Circuit agreed. See *Bibby*, 260 F.3d at 264. The problem is that John Bibby appeared to view "workplace harassment that is sexual in content [as] always actionable, regardless of the harasser's . . . motivations," a view flatly rejected in *Oncale*. 523 U.S. at 79; *see* Br. of Appellant John Bibby, 2001 WL 34117874, at *20; EEOC's Br., Ex. 1 ("Title VII's broad social policy is nothing less than the eradication of discriminatory animus and hostile behavior in the workplace" and the prevention of "the trauma and harm that often followed sexually harassing conduct in the workplace.").

word often takes on a more narrow connotation when it is expressly opposed to another word: 'car,' for example, has a broader meaning by itself than it does in a passage speaking of 'cars and taxis.'").

In sum, because John Bibby never posed the correct question, the *Bibby* Court never articulated the relevant standard for sex discrimination as established by the Supreme Court. Here, but for Mr. Baxley being male, his attraction to men would not have been an issue.

B. Discrimination Based On Same-Sex Relationships Is Analogous To Discrimination Based On Interracial Relationships, Both Of Which Are Prohibited By Title VII.

There is unanimous judicial consensus that discrimination based on an employee's interracial marriage or interracial associations constitutes race discrimination; indeed, this Court and the Third Circuit were pioneers in arriving at that judicial consensus. *See Sperling v. United States*, 515 F.2d 465, 484 (3d Cir. 1975), *cert. denied*, 426 U.S. 919 (1976); *Holiday v. Belle's Rest.*, 409 F. Supp. 904 (W.D. Pa. 1976). It is impossible to reconcile that consensus with an argument that discrimination based on one's same-sex intimate relationships is *not* sex discrimination under Title VII, which treats all its enumerated traits, such as race and sex, the same.[5]

[5] It is important to stress that *amicus* is not arguing that, from a societal standpoint, discrimination against an employee in an interracial marriage is identical to discrimination against an employee with a same-sex spouse. Instead, what is being pointed out is that Title VII equally prohibits both forms of discrimination. Notably, sexual harassment presents an especially compelling example of courts' insistence that all Title VII traits be treated the same, notwithstanding that 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 Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 68 (1986). Nevertheless, the same elements for a hostile work environment claim apply across the Title VII traits. *Id. See also Whidbee v. Garzarelli Food Specialties, Inc.*, 223

The EEOC has aptly articulated why—just as adverse action against someone because of their association with someone of a particular race has been recognized as race discrimination—adverse action against someone because of their romantic involvement with someone of a particular sex is sex discrimination. *See* EEOC's Br. at 7-9. Nonetheless, *amicus* proffers additional information to the Court in support of such proposition. Specifically, the Court may wonder: if this argument is so clear cut, why have courts not embraced it until very recently? The simple answer is that employees rarely made the argument. *See* Victoria Schwartz, *Title VII: A Shift From Sex to Relationships*, 35 Harv. J.L. & Gender 209, 251-55 (2012). The failure by litigants to articulate the comparator argument analogizing discrimination against those in interracial relationships with discrimination against those in same-sex relationships can be easily explained, however.

As discussed in Part III, *infra*, until quite recently, the law treated same-sex relationships as not worthy of *any* protection. In other words, the law would often treat a man differently if he was in a relationship with a woman as opposed to a relationship with a man. Such differential treatment served to undermine any Title VII comparator argument. *See*, *e.g.*, *Foray v. Bell Atlantic*, 56 F. Supp. 2d 327, 329-30 (S.D.N.Y. 1999) (stating that "difference in the ability to marry, which does not bear on the quality or stability of the relationship, is material").

But times have changed. Now, same-sex relationships have been recognized as constitutionally entitled to the same dignity and respect as any other type of relationship. This Court's analysis should be informed by how an individual's right to marry is protected by the Constitution no matter the race or sex of the person the individual chooses to marry. *See Obergefell*, 135 S. Ct. at 2604; *Loving v. Virginia*, 388 U.S. 1, 12 (1967). However, unlike

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F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims." (internal citation omitted)).

interracial couples, whose right to marry was recognized in 1967, same-sex couples were unable to marry in most jurisdictions until relatively recently. But now, there should be no question that whether for the purposes of due process analysis or statutory interpretation, same-sex relationships and interracial relationships are afforded the same protections.

As such, from a Title VII perspective, the analogy to interracial relationships is now on all fours. Courts and commentators alike have come to understand the comparator argument and to embrace it. *See*, *e.g.*, *Isaacs*, 2015 WL 6560655, at *3 (finding "[p]articularly compelling" *Baldwin*'s reliance on the seminal Eleventh Circuit Title VII case involving an employee in an interracial marriage); Shane T. Muñoz & David M. Kalteux, *LGBT, the EEOC, and the Meaning of "Sex*," 90 Fl. Bar J. 3 (Mar. 2016) ("If the employer does not also discriminate against a male because the male is in a relationship with a female, then the discrimination [against a lesbian] is, by definition, because of sex. The proposition seems so simple that the dearth of caselaw supporting it is somewhat surprising."), *available at* http://bit.ly/1U1pJ8e (last visited June 3, 2016); Omar Gonzalez-Pagan & Ria Tabacco Mar, *Laws Barring Sex Discrimination Also Protect Sexual Orientation*, N.Y. L.J. (Jan. 2016) ("That discrimination against lesbians and gay men also is associational discrimination is particularly apparent in the employee benefits context."), *available at* https://t.co/cAz3UFA0WR (last visited June 3, 2016).

Title VII "on its face treats each of the enumerated categories exactly the same." *Price Waterhouse*, 490 U.S. at 243 n.9. Because the same principles of construction apply to determining what constitutes discrimination "because of race" and "because of . . . sex," this Court should dictate the same treatment for same-sex relationships as interracial relationships.

C. Employees, Including LGBT Employees, Are Protected Against The "Entire Spectrum Of Disparate Treatment Of Men And Women Resulting From Sex Stereotypes."

In its brief, the EEOC ably explains that discrimination based on failure to conform to gender stereotypes is plainly proscribed by Title VII. *See* EEOC's Br. at 11-18. As the EEOC notes, many courts, including the Third Circuit, have recognized the difficulty of distinguishing between discrimination based on the failure to conform to the gender norm of opposite-sex attraction and discrimination based on the failure to conform to other gender norms. *See*, *e.g.*, *Prowel*, 579 F.3d at 291 (noting that the "line between sexual orientation discrimination and [sex] discrimination" is "difficult to draw"); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2d Cir. 2005) (observing that "the borders" between sex and sexual orientation are "imprecise"); *Christiansen v. Omnicom Grp., Inc.*, No. 15-cv-3440, 2016 WL 951581, at *14 (S.D.N.Y. Mar. 9, 2016) (stating "no coherent line can be drawn between" sex and sexual orientation claims); *Videckis*, 2015 WL 8916764, at *7 ("It is impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes," because "to do so would result in a false choice."); *Centola v. Potter*, 183 F. Supp. 2d 403, 408 (D. Mass. 2002). As a result, thoughtful courts have abandoned such an illusory quest.[6]

Indeed, the masculinity/femininity limitation imposed by some cases takes "much too narrow a view of what can constitute sex-based discrimination under Title VII." *Tomkins*, 568 F.2d at 1047 n.4. It inappropriately narrows the universe of relevant gender norms to only those that Ann Hopkins was deemed to transgress in *Price Waterhouse*, despite that case's declaration

[6] *See*, *e.g.*, *Isaacs*, 2015 WL 6560655, at *4; *Boutillier v. Hartford Pub. Sch.*, No. 13-cv-1303, 2014 WL 4794527, at *2 (D. Conn. Sept. 25, 2014); *TerVeer*, 34 F. Supp. 3d at 116; *Koren*, 894 F. Supp. 2d at 1038; *Heller*, 195 F. Supp. 2d at 1224; *Centola*, 183 F. Supp. 2d at 409.

that Title VII was "intended to strike at the *entire spectrum* of disparate treatment of men and women resulting from sex stereotypes." *Price Waterhouse*, 490 U.S. at 251 (emphasis added).[7]

The "entire spectrum" phrase previously appeared in *Manhart*, which had a decidedly broad view of what constituted discrimination based on sex stereotypes. 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." *Id*. 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. *Manhart* had nothing to do with behavior, appearance, masculinity, or femininity, and neither did the case from which *Manhart* borrowed the "entire spectrum" concept – *Sprogis v. United Airlines*, 444 F.2d 1194, 1198 (7th Cir. 1971), which invalidated an airline's policy against married female flight attendants.

"Congress designed Title VII to prevent the perpetuation of stereotypes and [] sense of degradation which serve[s] to close or discourage employment opportunities for" people, regardless of their sex. *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1483 (3d Cir. 1990). This is reflected in the many cases throughout Title VII's history that reflect a broad understanding of the sex stereotypes the statute forbids acting upon, including life choices about families and relationships. *See Back v. Hastings On Hudson Union Free Sch. Dist*., 365 F.3d 107, 119 (2d Cir. 2004) ("The principle of *Price Waterhouse*, furthermore, applies as much to

[7] As one court thoughtfully observed, "the Supreme Court in *Price Waterhouse* did not adopt a macho/effeminate theory of gender discrimination. Rather, it explicitly adopted a theory of harassment based on failure to conform to gender stereotypes. . . . [T]he issue is not whether a male plaintiff is effeminate, but rather whether he was harassed on the grounds that he was perceived as failing to satisfy stereotypical gender expectations." *Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F. Supp. 2d 952, 973 (D. Kan. 2005).

the supposition that a woman will conform to a gender stereotype (and therefore will not, for example, be dedicated to her job), as to the supposition that a woman is unqualified for a position because she does not conform to a gender stereotype."); *see also Pond v. Braniff Airways, Inc.*, 500 F.2d 161, 166 (5th Cir. 1974) ("[I]f 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."). One 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 [bona fide occupational qualification (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 [(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 v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) (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 County*, 441 F. Supp. 1351, 1358 (S.D. Ala. 1977) (chivalry should become neither paternalism nor instrument of employment discrimination against women).

Hardin v. Stynchcomb, 691 F.2d 1364, 1370 n.20 (11th Cir. 1982).[8]

[8] This court should not read too much into the statement in *Bibby* that the plaintiff "did not claim that he was harassed because he failed to comply with societal stereotypes of how men ought to appear or behave . . . ." 260 F.3d at 264. This should be read only as the literally true statement it is: John Bibby never even used the word 'stereotype' or 'stereotypical' in his brief. *See* EEOC's Br., Ex. 1; *see also Prowel*, 579 F.3d at 290 ("Because Bibby did not claim gender stereotyping, however, he could not prevail on that theory.").

In sum, Title VII condemns all discrimination based on failure to conform to sex stereotypes, whether that nonconformity relates to behavior, appearance, marriage and family decisions, or sexual orientation. Simply put, any "hostile or paternalistic acts based on perceptions about womanhood or manhood are sex-based or 'gender-based.'" *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 148 (3d Cir. 1999).

II. TITLE VII MUST BE CONSTRUED TO COVER ALL CLAIMS THAT MEET THE STATUTORY REQUIREMENTS, IRRESPECTIVE OF ANY CONJECTURES ABOUT CONGRESSIONAL INTENT.

The viability and authoritativeness of *Bibby* are undercut by its heavy reliance on congressional inaction for statutory interpretation. Reliance on congressional inaction for statutory interpretation, especially with regards to Title VII's sex discrimination proscription, is impermissible. The Supreme Court has repeatedly ruled that courts should entertain all Title VII claims that meet the statutory requirements, rejecting judicially-imposed limitations. Further, even if reliance upon Congress's track record were appropriate, history reflects Congress's refusal to disqualify Title VII claims based on sexual orientation, as it did in the Americans with Disabilities Act.[9]

[9] Moreover, as the EEOC points out, the other cases upon which *Bibby* relied are of limited persuasive authority because they were based on pre-*Price Waterhouse*/*Oncale* decisions or contained little to no analysis. *See* EEOC's Br. at 19-20. But the *Bibby* Court's reliance on *Higgins* is even more problematic than the EEOC argues. There, appellant Higgins tried to argue on appeal "a 'sex-plus' theory" under *Phillips*, 400 U.S. 542, and a sex-stereotyping theory under *Price Waterhouse*. *Higgins v. New Balance Ath. Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999). 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. By explicitly refusing to consider the principal countervailing arguments, *Higgins* should be of no persuasive value in other circuits.

A. Courts Should Not Rely Upon Congressional Inaction When Interpreting Title VII's Sex Discrimination Prohibition, Which Must Be Read, Under *Oncale*, To Encompass All Instances Of Discrimination "Because Of . . . Sex."

Even if reference to congressional inaction or acquiescence is appropriate in other statutory interpretation efforts, that exercise is unsuitable for interpreting Title VII.

The Supreme Court has railed against the dangers in general of relying on congressional inaction as a tool of statutory interpretation in the face of a clear Supreme Court interpretation of a statute. *See*, *e.g.*, *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990); *Zuber v. Allen*, 396 U.S. 168, 185 n.21 (1969); *Girouard v. United States*, 328 U.S. 61, 69 (1946). That is because congressional inaction may be interpreted in many different ways, including an acknowledgement that Title VII's sex discrimination prohibition already encompasses discrimination on the basis of sexual orientation. *See U.S. v. Craft*, 535 U.S. 274, 287 (2002); *Girouard*, 328 U.S. at 70. Nonetheless, in some areas such as taxation with "traditional year-by-year supervision," reliance on congressional acquiescence *may* be appropriate. *Zuber*, 396 U.S. at 185 n.21. As a result, it is prudent to adhere to the Supreme Court's dictates expressly delineating how to interpret Title VII, and especially its sex discrimination prohibition.

The Supreme Court has instructed that Title VII should be interpreted based on the words of the statute and not on some divining of the evils that Congress meant to address. When the Supreme Court held in *Oncale* "that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant . . . are of the same sex," it did so while noting that "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." 523 U.S. at 79. 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 actually 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.

In the present case, the Court's responsibility is to ask whether Mr. Baxley was mistreated because his attraction to men was deemed unacceptable because he is male. If the answer is yes, it is sex discrimination. Anti-coverage decisions have rejected arguments like this because of a misguided belief that such straightforward following of statutory language and precedent is somehow improperly adding "sexual orientation" to Title VII. *See*, *e.g.*, *Prowel*, 579 F.3d at 292 (recognizing such claims "would contradict Congress's decision not to make sexual orientation discrimination cognizable under Title VII"); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) ("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) (rejecting the "interracial relationship" analogy because "[a]dopting such a theory would serve to protect sexual orientation"). But "[t]he idea that congressional action is required (and inaction is therefore instructive in part) rests on the notion that protection against sexual orientation discrimination under Title VII would create a new class of covered persons. . . . [A]nalogous case law confirms this is not true." *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344, 364 (E.D.N.Y. 2015) (citation omitted).

Indeed, such a results-oriented approach is precisely contrary to the Supreme Court's jurisprudence 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 (2010), the Court acknowledged that "[t]he 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*)). Similarly, another employer—which retaliated against the employee by firing his fiancée—argued that "prohibiting reprisals against third parties *will lead to* difficult line-drawing problems." *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174 (2011) (emphasis added). The Court showed sympathy for the policy implications, but rejected the argument as contrary to the words of Title VII: "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.

The Supreme Court's actual concern in interpreting Title VII is to ensure that judge-made rules do 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. In *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028 (2015), the employer and the Tenth Circuit would have prevented recovery by one discriminated against "because of . . . religion" if the employer did not have "actual knowledge of a conflict between an applicant's religious practice and a work rule." *Id.* at 2033. 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."). Similarly, in *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (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 (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); *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (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"). So, whatever flexibility lower courts might have to interpret *other* statutes by reference to congressional inaction, 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.

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

Even if resort to Congress's treatment of Title VII were appropriate, there is almost no authority for relying on congressional inaction in the face of only intermediate appellate authority. The Supreme Court has relied on congressional inaction in the face of courts of appeals' decisions only a few times, none of which resemble in the slightest the congressional track record with respect to explicit protections for LGBT workers.

For example, last June, the Supreme Court found congressional inaction to be significant when Congress passed major amendments to the federal Fair Housing Act (FHA) and did not

change the statute's operative language, even though nine courts of appeals had held that claims for disparate impact liability were available under the statute. *See Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 135 S. Ct. 2507, 2520 (2015). In so doing, the Court cited one supporting case, *Manhattan Props., Inc. v. Irving Tr. Co.*, 291 U.S. 320, 336 (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." *Inclusive Cmtys.*, 135 S. Ct. at 2520.

But the congressional inaction finding in *Inclusive Cmtys.* was only an alternative holding and seemingly the weaker alternative at that. Instead, the Court primarily relied on the provisions that Congress actually passed—provisions that only made sense if disparate impact liability was available under the FHA. The Court stated, "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 added). 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 (stating that the drug conviction amendment would not "make sense if the FHA encompassed only disparate-treatment claims").

Moreover, 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.

As such, the parallel measuring point for any congressional inaction argument regarding Title VII would be the Civil Rights Act of 1991, the last extensive amendment to Title VII.[10] At that time, only one circuit court had ruled that Title VII excludes coverage of sexual orientation discrimination.[11] Thus, the circumstances surrounding circuit precedent and congressional inaction regarding such precedent are markedly different in the Title VII context than in the contexts explored by *Inclusive Cmtys.* and *Manhattan Properties*. No court should attach significance to congressional inaction in 1991 relating to that single circuit precedent.

Moreover, Congress's actions subsequent to *Price Waterhouse* reveal that Congress never intended for Title VII to have a sexual orientation exception to its coverage. In 1989, *Price Waterhouse* ruled that it is sex discrimination for employees to be fired for their nonconformity with gender norms. Congress took dead aim at *Price Waterhouse* in 1991, when

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[10] *See* E. Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 Conn. L. Rev. 441, 501 n.13 (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.").

[11] *See* I. Bennett Capers, *Note: Sex(ual Orientation) and Title VII*, 91 Colum. L. Rev. 1158, 1176 (1991) (identifying *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327 (9th Cir. 1979), as the leading anti-coverage case as of 1991).

it overruled the decision's mixed-motive holding but left untouched its sex stereotyping ruling. It would have been obvious to Congress in 1991 that LGBT employees would utilize the *Price Waterhouse* sex stereotyping theory, as many scholars were already urging such action. *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: Title VII-Burden of Proof in Mixed-Motive Cases*, 103 Harv. L. Rev. 340, 328 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-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 in the Law — Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1580-81 & n.16 (1989) (urging lesbian and gay workers to "emphasize the sexually stereotypical attitudes that lead employers to ban gay and lesbian workers").

And had Congress wanted to limit *Price Waterhouse*'s holding so that LGBT employees could not claim sex stereotyping discrimination, there was a ready exemplar. The Supreme Court has placed great weight on the significance of what provisions were enacted in the Americans with Disabilities Act ("ADA") but not included in the Civil Rights Act of 1991. *See Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013); *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009). When Congress passed the ADA in 1990, it incorporated a specific provision excluding homosexuality from the definition of "disability," despite the fact that it had not been viewed by medical and mental health authorities as an impairment since 1973. *See* 42 U.S.C. §§ 12211(a); Am. Psychiatric Ass'n, *Position Statement: Homosexuality and Civil Rights*

(1973), 131 Am. J. Psychiatry 497 (1974). The Civil Rights Act of 1991, which specifically repealed the part of *Price Waterhouse* regarding mixed-motive liability, was passed a year *after* the ADA. Still, Congress chose not to limit *Price Waterhouse*'s sex stereotyping holding or to amend Title VII to exclude coverage of sexual orientation discrimination, as it had a year earlier in passing the ADA. Congress's failure not to add the 1990 ADA exception for sexual orientation to Title VII coverage in 1991 speaks volumes. It thus would be wrong to judicially engraft the type of "gay exception" found in the ADA onto Title VII when Congress declined to do so.

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 rare reliance on congressional inaction when the Supreme Court has not ruled on the issue.

III. THIS COURT SHOULD REJECT EFFORTS TO CREATE A SEXUAL ORIENTATION EXCEPTION TO TITLE VII'S CLEAR STATUTORY LANGUAGE.

This Court should reject efforts to carve-out gay people from Title VII's proscription against discrimination that disregard Title VII's clear and broad statutory language.[12] Congress's actions subsequent to *Price Waterhouse* and the legal developments affecting lesbians and gay men subsequent to *Bibby* weigh heavily against judicially engrafting a sexual orientation exception to Title VII's coverage.

[12] As previously noted, this Court should not feel constrained by *Bibby* (or *Prowel*'s restatement of *Bibby*), because the Court may decline to follow *Bibby* based on its lack of harmony with antecedent and subsequent Supreme Court precedents and principles, including, among others, *Price Waterhouse* and *Oncale*. *See Tann*, 577 F.3d at 542.

The gay carve-out reflected in *Bibby* is illustrated by a hypothetical where the Acme Company issues a memorandum stating that the following employees were terminated for behavior unbecoming of "an Acme Lady": Agnes for driving a motorcycle to and from work, Beth for wearing pants and not wearing makeup or jewelry every day for six months, and Christine for having a relationship with another woman. If each employee sued under Title VII, they all should be allowed to proceed, because *all* have viable sex discrimination claims that they would not have been terminated for their conduct had they been male, based on the plain language of the statute and *Oncale*. As explained in Part II.B, *supra*, Congress's actions subsequent to *Price Waterhouse* reveal that Congress never intended for Title VII to have a sexual orientation exception to its coverage. It thus is wrong to judicially engraft the type of "gay exception" found in the ADA onto Title VII when Congress has declined to do so.

If this Court agrees that it should not read a gay exception to Title VII, it would not be contradicting *Bibby* but recognizing that the world in which *Bibby* was decided no longer exists. "The broader legal landscape has undergone significant changes since" *Bibby*. *See Christiansen*, 2016 WL 951581, at *13. When *Bibby* was decided, many people believed it was constitutional for states to deny lesbians and gay men the fundamental right to marry, and for the federal government to refuse to recognize the marriages of same-sex couples that managed to travel to the handful of jurisdictions that recognized their right to marry. Indeed, when *Bibby* was decided, conduct central to gay people's very identity was still criminalized in numerous states, subjecting lesbians, gay men, and bisexuals to widespread discrimination. *See Lawrence,* 539

U.S. at 575.[13] As such, it is not difficult to understand why the *Bibby* Court would engraft a gay exception onto Title VII's sex discrimination prohibition.

But "[t]he nature of injustice is that we may not always see it in our own times," *Obergefell*, 135 S. Ct. at 2598, and since *Bibby* was decided, the societal walls erected against gay people have steadily crumbled. In *Lawrence*, the Supreme Court "acknowledged, and sought to remedy, the continuing inequality that resulted from laws making intimacy in the lives of gays and lesbians a crime against the State," *Obergefell*, 135 S. Ct. at 2604, and it became clear that "same-sex couples have the same right as opposite-sex couples to enjoy intimate association." *Id.* at 2600. In 2014, Pennsylvania joined large portions of the country when the court in *Whitewood v. Wolf*, 992 F. Supp. 2d 410 (M.D. Pa. 2014), "concluded that all couples deserve equal dignity in the realm of civil marriage." *Id.* at 415. That holding was affirmed in 2015 when the Supreme Court held that laws barring same-sex couples from marriage "burden the liberty of same-sex couples, and . . . abridge central precepts of equality." *Obergefell*, 135 S. Ct. at 2604.

While none of these cases directly answer the question "of what protections Title VII affords," when considered together, they "reflect a shift in the perception, both of society and of the courts, regarding the protections warranted for same-sex relationships and the men and women who engage in them." *Christiansen*, 2016 WL 951581, at *13; *see also Roberts*, 115 F.

[13] *Romer v. Evans*, 517 U.S. 620 (1996) ameliorated some of the official stigmatizing effects on lesbians and gay men created by *Bowers v. Hardwick*, 478 U.S. 186 (1986). But the *Romer* majority never mentioned *Bowers*, and the victorious challengers to Amendment 2 did not urge its overruling at the time, instead arguing that *Bowers* did not justify "Amendment 2's application to individuals who do not engage in homosexual acts, but are merely of homosexual 'orientation.'" *Romer*, 517 U.S. at 641 (Scalia, J., dissenting). Since *Bowers* was not overruled until two years after *Bibby*, the Third Circuit might well have believed that lesbians and gay men were only protected from discrimination up until the point that they actually engage in same-sex intimacy, which would not have provided any meaningful protection to almost any gay people.

Supp. 3d at 348 ("As the nation's understanding and acceptance of sexual orientation evolve, so does the law's definition of appropriate behavior in the workplace."). It therefore is incumbent upon this Court to reject efforts to engraft a gay exception onto Title VII's sex discrimination prohibition, in the face of its clear statutory language. To do so "would disparage the[] choices and diminish the[] personhood" of gay people, *Obergefell*, 135 S. Ct. at 2602, and wrongly would cast lesbians and gay men out of Title VII's protective umbrella.

CONCLUSION

For the foregoing reasons, Lambda Legal respectfully requests that the Court deny Defendant's motion to dismiss and hold that Title VII's proscription on sex-based discrimination necessarily encompasses discrimination on the basis of sexual orientation.

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Respectfully submitted,

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