15-3775

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

MELISSA ZARDA, CO-INDEPENDENT EXECUTOR OF THE ESTATE OF DONALD ZARDA, AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTOR OF THE ESTATE OF DONALD ZARDA,
Plaintiffs-Appellants,

v.

ALTITUDE EXPRESS, INC., DOING BUSINESS AS SKYDIVE LONG ISLAND, AND RAY MAYNARD,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF *AMICI CURIAE* OF FOUR MEMBERS OF CONGRESS IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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I. STATEMENT OF INTERESTS OF *AMICI CURIAE*

Amici are United States Senator Jeffrey A. Merkley, Senator Tammy Baldwin, Senator Cory A. Booker and Representative David N. Cicilline. All are cosponsors of the Equality Act,[1] which, if enacted, will both clarify and expand current civil rights laws to better protect people of color, women and lesbian, gay, bisexual and transgender ("LGBT") Americans from discrimination. The Equality Act represents the latest bipartisan legislative effort to update our nation's laws with respect to LGBT Americans. It uses a "belt-and-suspenders" approach to reflect what the Act's cosponsors and various federal regulatory and judicial bodies already recognize: LGBT Americans are *already* protected against discrimination on the basis of sexual orientation and gender identity under Title VII of the Civil Rights Act of 1964 because sexual orientation and gender identity are inherently aspects of a person's "sex".

As members of Congress, we are uniquely able to advise the Court on draft and pending legislation. We also have an inherent interest in the proper interpretation of enacted laws and pending legislation—particularly when differing interpretations alternately vindicate or eliminate the rights of the constituents we represent. Different interpretations of Title VII have led to uncertainty in the

[1] This brief cites to the Senate version of the Equality Act, but the House and Senate versions, H.R. 2282 and S. 1006 respectively, are identical in substance.

workplace and left LGBT Americans inconsistently protected from workplace harassment and discrimination, despite applicable federal law. We firmly believe that Title VII's sex discrimination provision already prohibits discrimination based on an individual's sexual orientation and gender identity, and we urge the Court to overrule erroneous Second Circuit precedent to the contrary.

II. SUMMARY OF ARGUMENT

> "Numerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal agencies and courts have correctly interpreted these prohibitions on sex discrimination to include discrimination based on sexual orientation, gender identity, and sex stereotypes. In particular, the Equal Employment Opportunity Commission correctly interpreted [T]itle VII of the Civil Rights Act of 1964 in *Macy v. Holder*, *Baldwin v. Foxx*, and *Lusardi v. McHugh*. The absence of explicit prohibitions of discrimination on the basis of sexual orientation and gender identity under Federal statutory law, as well as the existence of legislative proposals that would have provided such explicit prohibitions, has led some courts to conclude incorrectly that current Federal laws prohibiting sex discrimination do not prohibit discrimination on the basis of sexual orientation and gender identity. It has also created uncertainty for employers and other entities covered by Federal nondiscrimination laws and caused unnecessary hardships for LGBT individuals."

Equality Act of 2017, S. 1006, 115th Cong. § 2(8)-(9) (2017). This is why *Amici* introduced the Equality Act of 2017 and drafted it both to codify current case law and to provide clarity and stability for the American people. The Equality Act expressly adds "sexual orientation" and "gender identity" to Title VII of the Civil Rights Act, S. 1006 § 7, and it *also* defines "sex" to *include* "sexual orientation and gender identity", S. 1006 § 9(2). *Amici* drafters did this intentionally because we wanted to recognize that, under current law, "sex" already includes and is inseparable from sexual orientation and gender identity.

This Court is reviewing whether Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of sexual orientation through its prohibition of discrimination "because of . . . sex". (5/25/17 Order, Docket

No. 271). Prior case law in this jurisdiction, like *Simonton v. Runyon*, 232 F.3d 33, 35-36 (2d Cir. 2000), has held that it does not. This holding is not only contrary to law, it is contrary to common sense—as the Seventh Circuit sitting en banc recognized earlier this year. *See Hively v. Ivy Tech Cmty. Coll. of Ind.*, 853 F.3d 339, 351 (7th Cir. 2017) ("[I]t is actually impossible to discriminate on the basis of sexual orientation without discriminating on the basis of sex . . . .").

Simonton was wrongly decided. Title VII's protections against sex discrimination necessarily include discrimination based on a person's sexual orientation. Sexual orientation discrimination is, by definition, a form of sex discrimination: it is impossible to discriminate against an employee on the basis of sexual orientation without reference to the employee's sex. Moreover, the Supreme Court held in *Price Waterhouse v. Hopkins* that gender stereotyping is a form of sex discrimination under Title VII. 490 U.S. 228, 235, 250-51 (1989). Because sexual orientation discrimination is invariably rooted in gender stereotypes, it necessarily constitutes discrimination on the basis of sex. And, just as it violates Title VII to discriminate against an employee based on the race of individuals with whom that employee associates, sex-based associational discrimination is similarly impermissible under Title VII. *See Christiansen v. Omnicom Grp., Inc.*, 852 F.3d 195, 202-07 (2d Cir. 2017) (Katzmann, J., concurring) ("find[ing] persuasive" the argument that sexual orientation

discrimination is sex discrimination, associational discrimination, and sex stereotype discrimination which "reflect[s] the evolving legal landscape since our Court's decisions in *Simonton* . . . .").

While Congress attempts to codify, update and expand civil rights protections for all LGBT Americans, courts continue to play a vital role by applying the law in individual cases. Indeed, the landmark Supreme Court cases of *Windsor* and *Obergefell* demonstrate the important role of the judiciary as a coequal branch with a duty to protect civil rights. The judiciary has an equal interest in the rule of law and in upholding an employee's statutory right to a workplace free of proscribed discrimination. Now before this Court is the opportunity to rectify a decades-long error in Title VII interpretation in the Second Circuit. The solution is straightforward, logical, just and supported by *Amici*. This Court should recognize that "sex" under Title VII encompasses sexual orientation, and *Simonton* and any other case law to the contrary should be overturned.

III. ARGUMENT

A. *Simonton* Must Be Overturned Because It Relied on Incorrect Interpretations of Congressional Actions and Outdated Law To Justify an Incoherent Interpretation of "Sex" Under Title VII.

The Second Circuit's ruling in *Simonton* that a claim for discrimination based on sexual orientation is not cognizable under Title VII's sex discrimination prohibitions, 232 F.3d at 35-36, misinterpreted congressional intent

and is inconsistent with the law. Specifically, the Court improperly relied on Congress's failure to pass legislation to explicitly protect LGBT status under Title VII, as well as on a number of cases that were implicitly overruled by the Supreme Court in *Price Waterhouse*. *Id.*; *see also Dawson v. Bumble & Bumble*, 398 F.3d 211, 217 (2005) ("Title VII does not prohibit harassment or discrimination because of sexual orientation." (quoting *Simonton*, 232 F.3d at 35)). The Equality Act is directed at clarifying the existing protections of Title VII, notwithstanding *Simonton*'s misinterpretations.

1. *Simonton*'s Reliance on the Employment Non-Discrimination Act's Legislative History Was Misplaced.

Simonton's short discussion of legislative history is wrong in at least two respects. First, *Simonton* summarily described the legislative history of the Employment Non-Discrimination Act (ENDA) as "Congress's rejection" of "extend[ing] Title VII's protection to people based on their sexual preferences". 232 F.3d at 35. Second, *Simonton* specifically cited Congress's "refusal" to pass ENDA during the 104th Congress in 1996 as evidence that Congress did not intend to expand the Civil Rights Act to protect against sexual orientation discrimination. *Id*. Below we address both of these two flawed assumptions.

The Supreme Court has warned against giving too much significance to rejected amendments to current law:

> "[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress. It is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns . . . a proposal that does not become law. Congressional inaction lacks persuasive significance because several equally tenable inferences may be drawn from such inaction, including the inference that the existing legislation already incorporated the offered change."

Pension Ben. Guar. Corp. v. LTV Corp., 496 U.S. 633, 650 (1990) (internal citations and quotation marks omitted). Here, and contrary to the discussion in *Simonton*, ENDA's failure to pass in the 104th Congress was a function of unusual circumstances and was not a reflection of congressional intent to "reject" ENDA. That year, ENDA failed in the Senate by only one vote, because of a single missing Senator who was called home for a family emergency. *See also* Richard Socarides, *Kennedy's ENDA: A Seventeen-Year Gay-Rights Fight*, New Yorker, Nov. 5, 2013. ENDA eventually *did* pass the Senate in 2013, by an overwhelming vote of 64-32. *On Passage of the Bill (S. 815 As Amended)*, United States Senate, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=113&session=1&vote=00232.

To justify its flawed reliance on ENDA's legislative history, the *Simonton* Court pointed to "consistent judicial decisions refusing to interpret 'sex' to include sexual orientation". 232 F.3d at 35-36 (citing *DeSantis v. Pacific Tel. & Tel. Co.*, 608 F.2d 327, 329-32 (9th Cir. 1979), and related cases that relied on *DeSantis* to suggest similar conclusions). The Court inferred that these

decisions must have aligned with Congress's intent, or Congress would have acted to change the law. *Id.* However, *DeSantis* and its progeny rejected a Title VII prohibition on sex stereotyping and were thus implicitly overturned by *Price Waterhouse* in 1989. *Compare Price Waterhouse*, 490 U.S. at 250-51 (holding that discrimination against a female plaintiff for her "aggressive" demeanor was a form of sex discrimination), *with DeSantis*, 608 F.2d at 331-32 (concluding before *Price Waterhouse* that disparate treatment because of male plaintiff's "effeminate appearance" was not sex discrimination). The Ninth Circuit expressly disavowed the sex stereotyping holding in *DeSantis* as inconsistent with *Price Waterhouse*. *See Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 875 (9th Cir. 2001). Thus the cases cited by *Simonton* were no longer authoritative law by the time that ENDA was introduced. *Simonton* assumed Congress introduced ENDA because it believed sexual orientation was not protected under Title VII, and that ENDA's failure represented a congressional refusal to expand Title VII protections. But it is equally plausible that ENDA was introduced to *clarify* as well as expand Title VII's protections, and that ENDA was not pursued by its drafters because *Price Waterhouse* had superseded case law holding that sexual orientation was outside the scope of Title VII. For the *Simonton* Court to select one inference over another was inherently arbitrary.

It was also arbitrary to single out ENDA as evidence of congressional intent, as there have been many other attempts to create similar legislation with no effect on Title VII jurisprudence. Only ten years after the Civil Rights Act was passed, Congress introduced the Equality Act of 1974, which would have provided expansive protections for lesbians and gay men, women and unmarried individuals in employment and places of public accommodation. Equality Act of 1974, H.R. 14752, 93d Cong. (1974). There is no indication that courts inferred any congressional intent from the introduction of this legislation or its failure to pass. In fact, courts have consistently held that unmarried women are covered under Title VII as a subset of sex, despite the fact that the proposed amendment would have added marital status protections explicitly. *See*, *e.g.*, *Sprogis v. United Air Lines, Inc.*, 517 F.2d 387, 389 (7th Cir. 1975) (describing *Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971), as the "final determination" on the merits, which rejected employer's argument that its single-women-only hiring policy was acceptable as "not directed against all females, but only against married females" and holding that "so long as sex is a factor in the application of the rule, such application involves discrimination based on sex").[2]

[2] See Part III.B.1 for a more detailed discussion of cases about discrimination based on sex plus marital status.

There were a range of other legislative proposals from 1975 to 1982 to prohibit "discrimination based upon affectational or sexual orientation", as noted by the Seventh Circuit in *Ulane v. Eastern Airlines, Inc*. 742 F.2d 1081, 1085 (7th Cir. 1984). Much like *Simonton*, *Ulane* pointed to this legislative history as evidence that Title VII did not protect transgender individuals. *Id*. at 1086 (also concluding that the absence of Civil Rights Act legislative history meant "sex should be given a narrow, traditional interpretation"). Yet that legislative history had no effect on the Supreme Court's more expansive interpretation of sex discrimination in *Price Waterhouse*—an interpretation which "eviscerated" *Ulane*'s approach, as "federal courts have recognized with near-total uniformity". *Glenn v. Brumby*, 663 F.3d 1312, 1318 n.5 (11th Cir. 2011) (quoting *Smith v. City of Salem*, 378 F.3d 566, 573 (6th Cir. 2004)); *see also Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (noting that "statutory prohibitions often go beyond" "the principal evil Congress was concerned with when it enacted" the statute).[3]

[3] Increasing numbers of courts applying the *Price Waterhouse* standard recognize that transgender individuals *are* protected from sex discrimination under Title VII because they are defined in part by their nonconformity with the sex stereotypes associated with the sex they were assigned at birth. *See, e.g.*, *Glenn*, 663 F.3d 1312; *Smith*, 378 F.3d 566; *Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000); *Schwenk v. Hartford*, 204 F.3d 1187 (9th Cir. 2000); *see also Mickens v. Gen. Electric Co.*, No. 3:16-CV-00603-JHM, 2016 WL 7015665, at *3 (W.D. Ky. Nov. 29, 2016) (recognizing that *Price Waterhouse*'s prohibition on sex stereotype discrimination "can extend to certain situations where the plaintiff fails

2. *Amici* Introduced the Equality Act To Codify Existing Law and Provide Explicit Protections for LGBT Americans Using a "Belt and Suspenders" Approach.

The Equality Act was drafted to codify current law and administrative rulings, to expand civil rights laws that do not currently prohibit sex discrimination and to put the public on clear notice that LGBT status is an explicitly protected characteristic under federal law. *Amici* also wished to avoid further confusion in the courts as to whether legislative proposals designed to protect employees from discrimination based on their sexual orientation and gender identity indicate that such protections do not exist under current law. There are currently 240 members of Congress cosponsoring the Act to prohibit discrimination against people of color, women and LGBT Americans across many different aspects of public life. But the Equality Act acknowledges that Title VII *already* protects against sexual orientation and gender identity discrimination. S. 1006 § 2(9) ("Numerous provisions of Federal law expressly prohibit discrimination on the basis of sex, and Federal agencies and courts have correctly interpreted these prohibitions on sex

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to conform to stereotypical gender norms" for transgender employees (quoting *Vinova v. Henry Cty. Bd. of Educ.*, No. 15-37-GFVT, 2016 WL 4993389, at *5-6 (E.D. Ky. Sept. 15, 2016)); *Fabian v. Hosp. of Cent. Conn.*, 172 F. Supp. 3d 509, 527 n.12 (D. Conn. 2016) ("The fact that the Connecticut legislature added [the term 'gender identity'] does not require the conclusion that gender identity was not already protected by the plain language of the statute, because legislatures may add such language to clarify or to settle a dispute about the statute's scope rather than solely to expand it.").

discrimination to include discrimination based on sexual orientation, gender identity, and sex stereotypes.”). *Amici* sought to affirm, not supersede, case law and administrative holdings that discrimination based on sexual orientation and gender identity is sex discrimination. We therefore took a “belt and suspenders” approach when drafting the Equality Act’s substantive provisions.

First, the Equality Act would amend Title VII to explicitly include “sexual orientation” and “gender identity” as protected characteristics alongside “sex”. S. 1006 § 7. We believed this would help clarify the statute for the average American who would look at its text without the benefit of legal experience or a repository of case law. For instance, anyone Googling the Civil Rights Act would learn that sexual orientation and gender identity were protected classes. In addition, “EEO is the Law” posters[4] would be amended to include sexual orientation and gender identity, thereby giving workers in a variety of fields and who speak a number of languages clearer guidance about their rights.

Second, in keeping with the proper interpretation of Title VII discussed in Part III.B, the Act also *defines* “sex” as including “a sex stereotype[,] . . . sexual orientation or gender identity”. S. 1006 § 9(2). This

[4] “EEO is the Law” posters are prepared by the EEOC and posted by employers in the workplace. They summarize federal laws prohibiting employment discrimination and explain how an employee or job applicant can file a complaint. *See “EEO is the Law” Poster*, U.S. Equal Employment Opportunity Commission, https://www1.eeoc.gov/employers/poster.cfm.

would codify both existing case law and EEOC rulings. *See infra* Part III.B. This definitional structure is the "suspenders" of our approach.[5] We further included a "no negative inference" provision, to ensure nothing in the amended Civil Rights Act "shall be construed to support any inference that any Federal law prohibiting a practice on the basis of sex does not prohibit discrimination on the basis of . . . sexual orientation, gender identity, or a sex stereotype". S. 1006 § 9(3).

Therefore, we not only believe this Court must review *Simonton* in light of a proper understanding of ENDA, but also that if this Court once again considers proposed legislation to inform its Title VII interpretation, the Equality Act of 2017 is the correct benchmark for such an inquiry.

B. Because Title VII's Protection Against "Sex" Discrimination Necessarily Encompasses Sexual Orientation Discrimination, *Simonton* Should Be Overturned.

Binding and persuasive case law, administrative law and legislative developments clearly dictate that discrimination on the basis of sexual orientation is discrimination on the basis of sex, and is therefore illegal under Title VII.

[5] Sexual orientation and gender identity are not the only examples of *Amici*'s efforts to codify Title VII's existing protections. Associational discrimination and discrimination based on sex stereotypes are already prohibited under current law, as discussed in Part III.B below. The Equality Act would make those express provisions of the statute. S. 1006 § 9(2) (defining "race" and "sex" as encompassing the "the race . . . [and] sex . . . respectively, of another person with whom the individual is associated or has been associated" and defining "sex" to include "a sex stereotype").

Further, the Supreme Court has repeatedly held that Title VII's protections were meant to "strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes". *Price Waterhouse*, 490 U.S. at 251 (quoting *City of L.A., Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). Sexual orientation discrimination is also a form of associational discrimination—discrimination on the basis of a class of people with whom one associates—in violation of Title VII.

For all these reasons, the EEOC, the agency charged with enforcing Title VII, interprets Title VII's sex-based protections to include discrimination based on sexual orientation and gender identity. *See Baldwin v. Foxx*, No. 0120133080, 2015 WL 4397641, at *5 (EEOC July 16, 2015) ("Discrimination on the basis of sexual orientation is premised on sex-based preferences, assumptions, expectations, stereotypes, or norms. 'Sexual orientation' as a concept cannot be defined or understood without reference to sex."); *Macy v. Holder*, No. 0120120821, 2012 WL 1435995, at *4 (EEOC Apr. 20, 2012) ("[T]he Commission hereby clarifies that claims of discrimination based . . . on gender identity, are cognizable under Title VII's sex discrimination prohibition."). The 240 Senators and Congressmen who have cosponsored the Equality Act agree that sexual orientation discrimination "is a form of sex discrimination", S. 1006 § 2(1), and the

Equality Act would amend Title VII to make the definition of "sex" explicitly encompass sexual orientation and gender identity, S. 1006 § 9.

There is no question that *all* employees, including LGBT employees, are protected under Title VII from sex discrimination, including gender stereotyping. *See Price Waterhouse*, 490 U.S. at 251. Yet, despite logic and countervailing case law, this Court has held that the definition of "sex" under Title VII should not be "bootstrapped" into prohibiting sexual orientation discrimination. *See Dawson*, 398 F.3d at 218; *Simonton*, 232 F.3d at 37-38. Unsurprisingly, this Court has struggled to distinguish sexual orientation discrimination from sex discrimination. *See, e.g.*, *Dawson*, 398 F.3d at 218 ("[S]tereotypical notions about how men and women should behave will often necessarily blur into ideas about heterosexuality and homosexuality." (quoting *Howell v. North Cent. Coll.*, 320 F. Supp. 2d 717, 723 (N.D. Ill. 2004)). District courts in this Circuit openly question the validity of such line drawing. *See Philpott v. New York*, No. 16 Civ. 6778 (AKH), 2017 WL 1750398, at *2 (S.D.N.Y. May 3, 2017) ("[B]ecause plaintiff has stated a claim for sexual orientation discrimination, 'common sense' dictates that he has also stated a claim for gender stereotyping discrimination . . . ."); *Boutillier v. Hartford Pub. Sch.*, 221 F. Supp. 3d 255, 269 (D. Conn. 2016) (excluding sexual orientation from Title VII's prohibitions is "paradoxical" and "inconsistent"); *Fabian*, 172 F. Supp. 3d at

524 n.8 (noting "nonconformity with gender stereotypes is stereotypically associated with homosexuality", so "courts and juries have to sort out the difference [between gender stereotypes and sexual orientation discrimination] on a case-by-case basis"); *Christiansen v. Omnicom Grp., Inc.*, 167 F. Supp. 3d 598, 622 (S.D.N.Y. 2016), *aff'd in part and rev'd on other grounds*, 852 F.3d 195 (2d Cir. 2017) ("In light of the EEOC's recent decision on Title VII's scope, and the demonstrated impracticability of considering sexual orientation discrimination as categorically different from sexual stereotyping, one might reasonably ask—and, lest there be any doubt, this Court is asking—whether that line should be erased.").[6] Overturning *Simonton* and its progeny would restore logic to Title VII jurisprudence, affording clear guidelines for employers and employees.

1. Discrimination "Because of … Sex", by Its Plain Meaning, Includes Sexual Orientation Discrimination.

As the Seventh Circuit sitting en banc noted in *Hively*, "[i]t would require considerable calisthenics to remove the 'sex' from 'sexual orientation.'" 853 F.3d at 350. Indeed, one *cannot* discriminate on the basis of an employee's sexual orientation without simultaneously discriminating because of that

[6] This interpretation of "sex" also applies in the Title IX context because it is "impossible to categorically separate 'sexual orientation discrimination' from discrimination on the basis of sex or from gender stereotypes; to do so would result in a false choice". *Videckis v. Pepperdine Univ.*, 150 F. Supp. 3d 1151, 1160 (C.D. Cal. 2015).

employee's sex. *See Boutillier*, 221 F. Supp. 3d at 267 ("Presuming that an employer has discriminated . . . because of such individual's sexual orientation, that employer has necessarily considered . . . the sex of the individual."). To discriminate against gay male employees, for example, is to treat male employees negatively for being attracted to men, while female employees do not face equally negative treatment for identical conduct. This constitutes a Title VII violation because "[t]he critical issue, as stated in *Oncale*, 'is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed'". *Simonton*, 232 F.3d at 36 (quoting *Oncale*, 523 U.S. at 80); *see also Christiansen*, 852 F.3d at 202 (Katzmann, J., concurring) ("[S]exual orientation discrimination is sex discrimination for the simple reason that such discrimination treats otherwise similarly-situated people differently solely because of their sex.").

Various other "sex plus" cases—such as discrimination based on parenthood and marital status—confirm that employers violate Title VII when they discriminate on the basis of a characteristic which cannot be understood without reference to the employee's sex. As this Court recognized in *Simonton*, Supreme Court precedent requires "that every victim of [impermissible] harassment must show that he was harassed *because he was male*". 232 F.3d at 36 (interpreting *Oncale*, 523 U.S. at 80-81). This requirement plainly does not preclude mothers or

unmarried women from establishing discrimination "because" they were female, even though their status as mothers or unmarried women is defined *both* by their sex *and* by their relationship to another individual. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (holding it impermissible to have "one hiring policy for women and another for men—each having pre-school-age children"); *Back v. Hastings On Hudson Union Free Sch. Dist.*, 365 F.3d 107, 118-121 (2d Cir. 2004) (relying on Title VII case law in an equal protection case to reject defendant's argument that "stereotypes about pregnant women or mothers are not based upon gender, but rather, 'gender plus parenthood'"). Sexual orientation is similarly defined *both* by an individual's sex *and* his or her relationship to other individuals.[7] Accordingly, sexual orientation is a protected subcategory of "sex" under Title VII. *See Hively*, 853 F.3d at 343.

This understanding of "sex" discrimination is also consistent with *Price Waterhouse* and mixed motives precedent, which holds that discrimination motivated by sex in *any* respect violates Title VII. 490 U.S. at 252.

> "[A]n employer may not meet its burden in [a mixed motives] case by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. . . . The employer instead must show

[7] Unlike parenthood or marital status, sexual orientation is an inherent characteristic defined by the employee's sex *and* the sex of individuals to whom the employee is attracted. Discriminating against an employee because of the sex of the individuals with whom the employee associates is in itself a form of impermissible sex discrimination. *See infra* Part III.B.3.

> that its *legitimate reason, standing alone*, would have induced it to make the same decision."

Id. (emphasis added). Any suggestion that a lesbian, gay or bisexual employee must establish that each instance of discriminatory conduct was motivated *solely* by sex is a misapplication of Title VII's mixed motives precedent. *See, e.g.*, *Dawson*, 398 F.3d at 223 (incorrectly suggesting that harassing comments against plaintiff may not be "actionable under Title VII because they appeared to relate to Dawson's sexual orientation and *not merely to her gender*" (emphasis added)).

For all these reasons, this Court's prior holding that it is possible to "allege[] that [a male employee] was discriminated against not because he was a man, but because of his sexual orientation" is internally incoherent. *Simonton*, 232 F.3d at 36. Discrimination based on sexual orientation is inescapably rooted in impermissible sex-based considerations and therefore violates Title VII. To hold otherwise is to defy common sense, the understanding of 240 bipartisan members of the House and Senate who have cosponsored the Equality Act and the position taken by the EEOC and other federal circuits.

2. Sexual Orientation Discrimination Is a Form of Impermissible Gender Stereotyping.

The Supreme Court stated in 1989 that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group." *Price Waterhouse*, 490 U.S. at 251.

The expectation that a member of one sex will be attracted to the opposite sex is the ultimate gender stereotype. *See Christiansen*, 852 F.3d at 205-06 (Katzmann, J., concurring); *Hively*, 853 F.3d at 346. To the extent that non-heterosexual employees experience discrimination on the basis of their sexual orientation, it is because those employees fail to conform to the gender stereotype of heterosexuality. According to *Price Waterhouse*'s binding interpretation of "sex", discrimination rooted in this gender stereotype, or any other gender stereotype, is "because of . . . sex" under Title VII. 490 U.S. at 250-51; s*ee also Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248 (11th Cir. 2017) (holding that a lesbian employee could state a claim for sex discrimination based on nonconformity to gender stereotypes), *pet. for reh'g en banc filed* (Mar. 31, 2017); *Winstead v. Lafayette Cty. Bd. of Cty. Comm'rs*, 197 F. Supp. 3d 1334, 1346 (N.D. Fla. 2016) ("[D]iscrimination on the basis of sexual orientation is necessarily discrimination based on gender or sex stereotypes . . . .").

Case law in this jurisdiction holds that sex discrimination under Title VII should not be "bootstrapped" into encompassing sexual orientation discrimination. *See Dawson*, 398 F.3d at 218; *Simonton*, 232 F.3d at 37-38. But "the line between a gender nonconformity claim and one based on sexual orientation" simply "does not exist". *Hively*, 853 F.3d at 346, 350-51. The courts'

attempts to differentiate these two forms of discrimination have naturally "led to confusing and contradictory results". *Id*.

For example, plaintiffs who face discrimination because they are *perceived* to have a non-heterosexual orientation have a claim if they can show the discrimination was due to gender stereotyping, while plaintiffs who face discrimination because they *in fact* have a non-heterosexual orientation have no claim. *See Estate of D.B. by Briggs v. Thousand Islands Cent. Sch. Dist.*, 169 F. Supp. 3d 320, 332-33 (N.D.N.Y. 2016) ("If the harassment consists of homophobic slurs directed at a homosexual, then a gender-stereotyping claim by that individual is improper bootstrapping. *Dawson*, 398 F.3d at 218. If, on the other hand, the harassment consists of homophobic slurs directed at a *heterosexual*, then a gender-stereotyping claim by that individual is possible."), *abrogated in part on other grounds by Christiansen*, 852 F.3d 195. Such hyper-nuanced factual distinctions lead to incongruent outcomes. *Compare Gilbert v. Country Music Ass'n*, 432 F. App'x 516, 520 (6th Cir. 2011) ("For all we know, Gilbert fits every male 'stereotype' save one—sexual orientation—and that does not suffice to obtain relief under Title VII."), *and Bianchi v. City of Philadelphia*, 183 F. Supp. 2d 726, 737-38 (E.D. Pa. 2002) ("[Plaintiff's] unwavering persistence in presenting his complaint as one concerning his alleged sexuality, rather than one concerning his alleged failure to meet a masculine ideal, defeats his Title VII harassment claim."),

with Nichols, 256 F.3d at 874 (finding that gay male plaintiff[8] had a Title VII claim not because of his sexual orientation, but because of evidence that he was harassed for being effeminate), *and Centola v. Potter*, 183 F. Supp. 2d 403, 407-10 (D. Mass. 2002) (denying defendant's summary judgment motion because alleged harassment about plaintiff employee's perceived sexual orientation may be based on impermissible gender stereotypes).

That a plaintiff's success in court depends on these arcane distinctions is impractical for employers and employees and incompatible with *Price Waterhouse*. As Chief Judge Katzmann recognized in the majority concurrence in *Christiansen*, the test under *Price Waterhouse* is quite simple: "[I]f gay, lesbian, or bisexual plaintiffs can show that they were discriminated against for failing to comply with some gender stereotype, including the stereotype that men should be exclusively attracted to women and women should be exclusively attracted to men, they have made out a cognizable sex discrimination claim." 852 F.3d at 206.

3. Sexual Orientation Discrimination Is Also Impermissible Associational Discrimination.

If an adverse employment consequence results from an employee's personal association with someone of the same sex, then the employee has undeniably suffered discrimination because of sex under Title VII. *See*

[8] *See Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1068 (9th Cir. 2002) (Pregerson, J., concurring) (describing the *Nichols* plaintiff as a gay man).

Christiansen, 852 F.3d at 204-05 (Katzmann, J., concurring). Such associational discrimination is a well-established violation of Title VII in the context of race discrimination. *See Holcomb v. Iona College*, 521 F.3d 130, 138 (2d Cir. 2008) ("[A]n employer may violate Title VII if it takes action against an employee because of the employee's association with a person of another race.").

Indeed, associational discrimination has played a role in a wide range of Title VII cases, all recognizing that disparate treatment or harassment because of an employee's interracial associations inevitably takes the employee's own race into account. *See, e.g.*, *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 514 (6th Cir. 2009) (subjecting employees to a hostile work environment because of their association with and advocacy for their African-American colleagues is race-based discrimination under Title VII); *McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1118 (9th Cir. 2004) (harassing plaintiff because of interracial friendships with co-workers violates Title VII); *Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, & GMC Trucks, Inc.*, 173 F.3d 988, 994-95 (6th Cir. 1999) (discharging plaintiff for having a biracial child violates Titles VII); *Parr v. Woodmen of the World Life Ins. Co.*, 791 F.2d 888, 891-92 (11th Cir. 1986) (denying employment because of white plaintiff's marriage to a black woman violates Title VII). Disparate treatment or harassment because of an employee's associations with individuals of a particular race inherently stems from and expresses disapproval of those associations. *See,*

e.g., *Holcomb*, 521 F.3d at 140 ("[T]here is clearly evidence in the record of [employer's] disapproval of [plaintiff's] marriage to a black woman, and, indeed . . . willingness to act on his disapproval.").

The same standard applies "with equal force" to Title VII's other enumerated characteristics, including sex. *Price Waterhouse*, 490 U.S. at 243 n.9; *see also Whidbee v. Garzarelli Food Specialities, Inc.*, 223 F.3d 62, 69 n.6 (2d Cir. 2000) ("[T]he same standards apply to both race-based and sex-based hostile environment claims." (quoting *Richardson v. N.Y. Dep't of Corr. Serv.*, 180 F.3d 426, 436 n.2 (2d Cir. 1999)). The only distinction between the standards for assessing race- and sex-based discrimination is the statutory exception for sex-based bona fide occupational qualifications, 42 U.S.C. § 2000e-2(e)(1), an extremely narrow category that would not extend to a heterosexuality requirement. Therefore, under a correct and consistent application of Title VII, disparate treatment based on an employee's same-sex associations is discrimination based on sex, just as disparate treatment based on an employee's interracial associations is discrimination based on race.

C. Overturning *Simonton* Will Bring Needed Clarity to Title VII Law and Protect Employees from Abhorrent Workplace Discrimination.

Simonton's interpretation of Title VII cannot withstand the more recent and more logical countervailing interpretations of Title VII. *See Hively*,

853 F.3d at 350-51. The *Simonton* opinion has created uncertainty and complexity in Title VII law, with tangible negative repercussions on the LGBT population in this jurisdiction. *Simonton* requires plaintiffs in employment discrimination lawsuits to carefully frame their complaint in terms of narrow categories of gender stereotypes, which cannot be meaningfully distinguished from sexual orientation. Further, the conduct proscribed under a proper interpretation of "sex" discrimination is appropriately recognized across the circuit courts as abhorrent—conduct not worth protecting. *See, e.g.*, *Simonton*, 232 F.3d at 35 ("There can be no doubt that the conduct allegedly engaged in by Simonton's coworkers is morally reprehensible whenever and in whatever context it occurs, particularly in the modern workplace."); *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 764-65 (6th Cir. 2006) ("[T]he harassment alleged by Vickers reflects conduct that is socially unacceptable and repugnant to workplace standards of proper treatment and civility . . . ."); *Bibby v. Philadelphia Coca Cola Bottling Co.*, 260 F.3d 257, 265 (3d Cir. 2001) ("Harassment on the basis of sexual orientation has no place in our society."); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999) ("[H]arassment because of sexual orientation . . . is a noxious practice, deserving of censure and opprobrium.").

In the present case, Zarda alleged that he was shamed at work for wearing the color pink and was ultimately fired for stating his sexual orientation to

a customer, even though his heterosexual coworkers made similar comments to customers and suffered no negative consequences. Second Am. Compl. at 4-8, *Zarda v. Altitude Express*, No. 2:10-CV-04334-JFB-AYS (E.D.N.Y. Mar. 28, 2014). This is quintessential sex discrimination, which is not and should not be permitted in the workplace under Title VII. *See Christiansen*, 852 F.3d at 207 (Katzmann, J., concurring) (urging this Court to "reexamin[e] the holding that sexual orientation discrimination claims are not cognizable under Title VII"). Therefore, this Court should overturn *Simonton* and its progeny and find that Title VII's prohibition on sex discrimination includes sexual orientation discrimination.

IV. CONCLUSION

For the foregoing reasons, we respectfully request that this Court reverse and remand.

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Respectfully submitted,

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This brief complies with the type-volume limitations of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,958 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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